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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD NIXON,
Petitioner,

v.

GERALD P. CARMEN, Administrator
General Services Administration, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the Administrator of General Services may grant direct public access, at regional listening centers, to tape recordings of private presidential conversations conducted within the Oval Office, and refuse to give "serious consideration" to less intrusive means of implementing the Presidential Recordings and Materials Preservation Act.

(2) Whether, notwithstanding the existence of alternative, less intrusive methods for distinguishing between private and official entries, the staff of the National Archives may review, word-by-word, the recorded diary entries of former President Nixon in order to determine whether the entries constitute "private or personal" material within the meaning of the Presidential Recordings and Materials Preservation Act.

(3) Whether petitioner was entitled to discovery on issues which this Court, in *Nixon v. Administrator,* 433 U.S. 425 (1977), deemed relevant to determining the validity of the Act's implementing regulations.

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OPINIONS BELOW

The decision of the Court of Appeals (Pet. App. A, pp. 1a-39a, *infra*), issued on February 9, 1982, is reported at 670 F.2d 346 (D.C. Cir. 1982). The orders of the District Court, issued without opinion or memorandum, are reproduced at Pet. App. C, pp. 41a-43a, *infra*.

JURISDICTION

The decision of the Court of Appeals was issued on February 9, 1982. A timely petition for rehearing was denied on March 24, 1982. Pet. App. B, p. 40a, *infra*. On

June 16, 1982, the Chief Justice extended the time within which to file a petition for writ of certiorari to and including August 6, 1982. Pet. App. D, p. 44a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

(1) The Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 n. (1976), is set out in its entirety at Pet. App. E, pp. 45a-52a, *infra*.

(2) Section 105-63.404 of Title 41, Code of Federal Regulations, governing public access to the presidential tape recordings is set out in its entirety at Pet. App. E., pp. 52a, *infra*.

(3) Section 105-63.104(b) of Title 41, Code of Federal Regulations, defining "private or personal materials," and Section 105-63.401-2(a) of Title 41, Code of Federal Regulations, governing the review and segregation of "private or personal materials," are set out in their entirety at Pet. App. E, p. 53a, *infra*.

STATEMENT

In *Nixon v. Administrator*, 433 U.S. 425 (1977), this Court upheld as facially constitutional the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 n. ("the Act"), which authorized government seizure and review of all the tapes and papers of Mr. Nixon's presidency. In doing so, the Court noted that the Act required that "in designing the regulations, the Administrator must consider the need to protect the constitutional rights of appellant and other individuals against infringement by processing itself or, ultimately, by public

access to the materials retained." 433 U.S. at 436. Concurring, Justice Powell observed that, because the processing and access regulations had not yet been promulgated, "[t]he difficult constitutional questions lie ahead." 433 U.S. at 503. In particular, Justice Powell noted that (433 U.S. at 504; emphasis added):

> The Court's discussion of the interests served by [the Act] should not foreclose in any way the search that must yet be undertaken for means of assuring eventual access to important historical records *without infringing individual rights protected by the First, Fourth, and Fifth Amendments.*

The courts below ignored these warnings and sustained the validity of a GSA regulation that authorizes the use of regional listening centers throughout the country at which the general public can have direct access to the closed-door conversations between a President and anyone with whom he spoke, regardless of their reasonable expectations of privacy, so long as their conversation did not involve purely "private" topics, security classified information, or other narrowly limited categories exempt from disclosure by regulation.[1] The judgment below also authorized

[1]The regulations admittedly provide that conversations dealing with strictly private or personal topics will be returned to Mr. Nixon. However, the definition of "private" restricts this category to conversations relating "solely to a person's family or other non-governmental activities." § 105-63.104(b). Thus, any discussion having to do, for example, with the former President's views of other political figures are not to be treated as private. With regard to all non-personal topics, the regulations provide that such conversations will be withheld from public listening for a period of time if they deal with (a) trade secrets, (b) security classified information, or (c) material that is libelous of a living person or that would constitute a clearly unwarranted invasion of personal privacy. (41 C.F.R. § 105-63.402-1(a), 41 C.F.R. § 105-63.402-2(b)) Conversations between the President and his advisors concerning all other general political and governmental topics,

archivists to conduct word-by-word reviews of former President Nixon's dictated diaries before returning them to him, notwithstanding this Court's expressed concern over intrusion into Mr. Nixon's personal privacy, which resulted in the directive that the Administrator return the the diaries promptly once they are identified. 433 U.S. at 459 n.22; *see also* 433 U.S. at 487-88 & n. (White, J., concurring); 433 U.S. at 496 n.2 (Powell, J., concurring).

These two significant issues were decided on an inadequately developed record following the district court's denial of important discovery requested by petitioner. The district court's discovery rulings deprived the court of appeals and this Court of the very information this Court cited in *Nixon v. Administrator,* 433 U.S. at 448-452, as necessary to a resolution of the merits of the issues raised here for review.

(1) Proceedings in the District Court

Following this Court's decision in *Nixon v. Administrator, supra,* petitioner filed the original complaint in this suit challenging the validity of certain regulations pertaining only to the processing of his materials. Portions of those regulations were thereafter revised to accommodate some of Mr. Nixon's claims. Mr. Nixon then filed an amended complaint challenging remaining aspects of the regulations and he sought discovery from, *inter alia,* the Administrator and the Archivist of the United States concerning the proposed handling of the presidential materials. The Administrator immediately moved for a

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such as strategies on legislative initiatives, will not be restricted unless Mr. Nixon successfully asserts a particularized claim of privilege. In sum, the regulations provide more solicitude for trade secrets and commercial information than they do for a President's confidential conversations.

protective order, and the district court barred *all discovery* pending its ruling on the Administrator's motion to dismiss or for summary judgment.

The public access regulations were submitted thereafter to both Houses of Congress for approval. After they became effective, Mr. Nixon then amended his complaint a second time to challenge them. The Administrator – *conceding* that the content of the public access regulations had been influenced by congressional action – admitted they were unconstitutional because adopted under the one-house congressional veto procedure. After more than a year of negotiations, the parties settled all of Mr. Nixon's claims except those involving (a) word-by-word review by archivists of Mr. Nixon's personal diaries, and (b) 41 C.F.R. § 105-63.404(c), pursuant to which the Administrator will create regional listening centers throughout the country for direct access by the general public to the presidential tape recordings.[2]

Petitioner then filed a third amended complaint covering the two unresolved issues. However, faced with the district court's previously imposed – and still outstanding – order prohibiting *all* discovery, Mr. Nixon sought, and was granted, leave to serve a limited number of requests for admissions, interrogatories and a document demand upon the Administrator. Among other things, he sought information concerning the position of the White House on the proposed dissemination of the White House tapes through regional centers in order to learn whether the incumbent

[2]Although the Administrator conceded the unconstitutionality of the regulations because they were promulgated under the one-house veto provision, Mr. Nixon agreed, *inter alia*, not to assert that as a basis for invalidating the regulations in exchange for the Administrator's agreement to make other revisions in the processing and public access regulations.

President was even aware of the regulation, much less approved of it.

The Administrator refused to respond to the document demand as to any materials within the possession of the White House personnel concerning White House input regarding alternative proposals for public access to the presidential tape recordings. Mr. Nixon thereafter noticed the deposition of White House Counsel Robert Lipshutz on the Administrator's motion, the district court quashed the deposition.

Nearly a month later, the Administrator cross-moved for summary judgment and submitted an affidavit containing numerous factual assertions by a Deputy Assistant Archivist. Mr. Nixon asked for leave to depose the affiant, or his supervisor, the Archivist, and to develop information relating to the archival handling of the tapes of Presidents Kennedy and Johnson. Such information would have shed considerable light on the affiant's statements and the issues before the court. In keeping with its prior rulings, the district court again blocked petitioner's attempt to develop a complete record. Notwithstanding an offer of proof from Mr. Nixon concerning factual matters that he would establish if afforded the opportunity, the district court, in a one-page order, granted summary judgment for the Administrator. Pet. App. C.

(2) The Court of Appeals' Decision

The court of appeals affirmed. It rejected the contention that dissemination of White House tapes through regional listening centers violates Mr. Nixon's personal rights of privacy and political association under the Fourth and First Amendments, on the ground that a Presi-

dent has a privacy interest *only* in those conversations where the *content* consists of non-governmental, personal topics. In the court's view, "Mr. Nixon while President could have had such an expectation [of privacy] in some materials, such as diaries or other communications respecting personal matters unrelated to his public duties, but not in materials relating to the conduct and official duties of the Presidency"(citations omitted). Pet. App. A at 15a-16a. The court viewed Mr. Nixon's political and associational rights as limited to conversations having only to do with "partisan politics," which are to be restricted by regulations from public access. Pet. App. A at 17a. Thus all discussions of "politics" as that term applies to the vast majority of a President's discussions were deemed not deserving of protection from public dissemination.[3]

The court also rejected Mr. Nixon's claim that public listening centers unwarrantedly infringe on the Presidential privilege of confidentiality, on the ground that Mr.

[3]The extremely narrow construction to be given the category "private political" is reflected in the examples of "private political" versus "public political" items used in the Archivists' Manual. One example from the manual, a portion of which was placed in the Appendix before the court of appeals, is:

> "The archivist uncovers a memorandum to the President in which a staff member analyzes the substance of and suggests prospective responses to a speech delivered the previous day by Democratic Presidential nominee George McGovern on the Viet Nam situation.
>
> Conclusion: This memorandum falls within the scope of Presidential historical materials and must be retained for further processing.
>
> Rationale: Although produced in the context of a Presidential campaign, the existence of the memo suggests the potential exercise of Presidential powers or duties as a campaign strategy. In effect, the memo evidences a direct relationship between the Presidential campaign and the potential conduct of the President's powers as Commander-in-Chief."

Nixon retains the opportunity to assert such privilege on a conversation-by-conversation basis. Recognizing that "[t]he opportunity to challenge particular disclosures, of course, does not guarantee that whatever access is eventually allowed will have no adverse effect on the Presidential privilege of confidentiality", Pet. App. A at 20a, the court nonetheless discounted the "seriousness" of this adverse effect because President Carter, whose position on the regulation Mr. Nixon had been barred from discovering, had not challenged the regulation on this ground, and because the privilege "erodes with the passage of time" and none of these taped conversations will be released until "at least eight years after the event disclosed." Pet. App. A at 20a.

On the issue of the diary review, the court concluded that archival reliance on the "trigger phrases" Mr. Nixon used to preface his diary dictations might result in "unreliable or incomplete identification." Because there is "no single trigger phrase," and because his earliest diary dictations are marked by the absence of any addressing phrase, the court did not "view as unreasonable the archivists' insistence upon not being restricted to that alleged identifying feature." Pet. App. A at 34a-35a.

Finally, the court of appeals sanctioned the district court's severe limitations on Mr. Nixon's attempted discovery. It said that the first order blocking petitioner's discovery efforts came before the filing of the operative amended complaint, that the second prohibition came after petitioner had filed his motion for partial summary judgment, and that the third came after all cross-motions for summary judgment had been filed. Pet. App. A at 37a-38a. The court omitted from this sequence the fact that the second prohibition stemmed from petitioner's ef-

fort to force the government to produce documents it had withheld in response to a request for production of documents filed *before* the summary judgment request, and that the third and final bar was imposed in reply to petitioner's effort to depose a witness whose affidavit the Administrator had relied upon in his cross-motion for summary judgment. In any event, the court also concluded that no matter what information Mr. Nixon's discovery might have elicited, it would not have changed its opinion as to the validity of the regulations. Among other things, the court stated that "[t]he constitutionality *vel non* of the public access regulation does not turn on the methods by which materials accumulated during prior Presidential terms were stored and made available to the public." Pet. App. A at 39a.

REASONS FOR GRANTING THE WRIT

1. Conceding that he had never given "serious consideration" to any less restrictive alternative, the Administrator adopted a regulation permitting direct public access to petitioner's White House tape recordings at listening centers around the country. The tapes span approximately two and a half years of Mr. Nixon's presidency. The Administrator's obligation to preserve his right of privacy, accord appropriate weight to the Presidential privilege of confidentiality, and protect his right of political association under the First Amendment, requires that "serious consideration" be given to some alternative mode of public dissemination of the information on the recordings. Based on suggestions first advanced by the three-judge district court that upheld the Act, *Nixon v. Administrator,* 408 F. Supp. 321 (D.D.C. 1976) and later espoused by Members of this Court in affirming that decision, 433 U.S. at 496, Mr. Nixon proposed several alter-

natives that would have fully accomplished the Act's goals while impinging far less on his specified rights and privileges, as well as the rights and privileges of others.

In holding that Mr. Nixon's claim of privacy could only pertain legitimately to those conversations in which the *content* consisted of non-governmental, personal topics, the court below departed abruptly from this Court's rulings that the right of privacy is defined not by the content of what is said but by the circumstances under which it is expressed. *See United States v. Payner,* 447 U.S. 727, 731 (1980); *Rakas v. Illinois,* 439 U.S. 128, 143 (1978); *Katz v. United States,* 389 U.S. 347 (1967). This Court has explained that "the Fourth Amendment protects people," and that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States, supra,* 389 U.S. at 351-52. *See United States v. Chadwick,* 433 U.S. 1, 7 (1977).

The recordings at issue here were made in Mr. Nixon's office, with the door shut behind him, under the same conditions in which Presidents Kennedy and Johnson had maintained the confidentiality of their recorded conversations. Consequently, Mr. Nixon had a reasonable expectation of privacy and was entitled to conduct his personal *and* business affairs within a "zone of privacy" out of the public's view or hearing.

The court of appeals provided no authority[4] for the pro-

[4]The court's determination that the Presidential tape recordings of "non-personal" discussions do not warrant privacy protection constitutes circular reasoning. According to the court, "[s]uch materials are deemed nonprivate precisely because of the public's traditional interest in and eventual access to them." Pet. App. A at 17a. In other words, the public is entitled to access (and the President has no privacy) because the public has an interest in having access. Of course,

position that the President is entitled to no privacy when he retreats behind the doors of the Oval Office to discuss with a Congressman, or a private citizen, or a staff member their ideas concerning potential legislation, a pending election, the menu for a state dinner, or the conditions of the country generally. This brushed aside Justice Powell's observation in *Nixon v. Administrator,* 433 U.S. at 504, that "even in the councils of Government an individual 'has a legitimate expectation of privacy in his personal communications.'"

If the court of appeals is correct that "the public trust" historically attaching to high office, and the mere "assumption of a public role" are sufficient to deny a person's expectation of privacy, (*see* Pet. App. A at 16a), then no President (or Member of Congress, for that matter) could preclude based on grounds of privacy the press or any member of the public from prying behind his or her closed office doors. The lower court has held that any expectation of privacy for such closed-door conversations is unreasonable if a person is involved in government business and the conversations are not strictly covered by a particular privilege. Such a proposition is far-reaching and should not be upheld by this Court.

Moreover, the court of appeals' decision constitutes a retroactive and factually unsupportable finding as to the reasonableness of Mr. Nixon's expectation of privacy. At the time he recorded his Oval Office conversations, at least four prior Presidents had done likewise. When each of

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the court conveniently ignored the fact – since it was not in the record and it refused to permit Mr. Nixon to gather evidence on the point – that no member of the public *ever* has had access to the recordings of four prior Presidents.

them left office, he or someone acting on his behalf controlled the manner in which his conversations would become public. The court of appeals could not conclude that Mr. Nixon's expectation of privacy was unreasonable without conflicting with President Johnson's 50-year ban on even the *government's* access to his tape recordings, and the control President Kennedy's family and friends have to this day over the disclosure of President Kennedy's tape recorded conversations.

The court of appeals also failed to give weight to the Presidential privilege of confidentiality. As this Court made plain in *United States v. Nixon,* 418 U.S. 683, 715 (1974):

> The need for confidentiality [for a President] even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment.

Operating jointly with petitioner's privacy and political association rights, this privilege necessarily heightens the constitutionally-protected interests at stake in this case. Nonetheless, the court of appeals approved the Administrator's refusal to restrict public access to the materials.

The court below suggested that by proposing alternatives for public access to information contained in the recordings, Mr. Nixon undercut his claim that direct public access to the tapes infringes his rights. The court misapprehended the import of the suggested alternatives. Justice Powell's concurrence in *Nixon v. Administrator,* 433 U.S. at 498, indicates that direct access by the public to the tapes themselves constitutes the most significant intrusion upon the rights of the former President and others. At the

same time, it notes that certain legitimate objectives warrant some intrusion on those rights. Deferring direct public access for a period, such as the life of the participants in the conversations, or substituting written synopses or even transcripts for the recordings themselves, advances the Act's legitimate objectives without unduly encroaching upon the rights of the conversants.[5]

Finally, in deprecating Mr. Nixon's contention that the regulation fails adequately to safeguard the rights and privileges he claims, the court of appeals found comfort in the "incumbent's [President's] failure to mount a similar challenge at the time Mr. Nixon brought this suit. . . ." Pet. App. A at 20a. But the district court banned from the record any effort to discern the incumbent's position concerning the legitimacy of this regulation. Mr. Nixon

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[5]The court below failed to give any consideration to the fact that public access to actual voice recordings is a greater intrusion on one's privacy than dissemination of transcripts. A public official, simply because he is a public official, does not forfeit his right to express his private feelings in a confidential setting. A public decision and an official's implementation of that decision may be subject to public scrutiny. But the manner and tone of his personal expressions, purposely undertaken in the privacy of his office, remain a personal and private moment to him. There is no "public trust" that attaches, for example, to the decibel level of an official's expressions made in confidence, and there is no evidence in the record that any public official has ever expected that such aspects of his private expressions would be published to the world. The court's decision failed to analyze what, if any, "public trust" attached to such things as voice inflections of participants in confidential conversations. Instead, it focused solely on the *content* of the conversations.

sought it through discovery, but he was blocked by the district court.[6]

In order to uphold the validity of this regulation, the court of appeals was forced to deviate significantly from the Fourth Amendment decisions of this Court and to ignore the teachings of two decisions by this Court regarding the presumptive quality of the Presidential privilege of confidentiality. In order to correct the lower court's rulings on these points, the Court should issue a writ of certiorari.

2. In *Nixon v. Administrator,* 408 F. Supp. 321, 357 (D.D.C. 1976), the three-judge court expressly found that Mr. Nixon's diaries "fully implicate privacy concerns" deserving constitutional protection, and should be returned promptly to Mr. Nixon pursuant to the Act. The Solicitor General represented to this Court during oral argument that these diary entries in fact would be returned to Mr. Nixon "once it was identified." 433 U.S. at 490 n. The unlimited archivist discretion, including word-by-word review, proposed by the Administrator for identify-

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[6]The court held that the Presidential privilege of confidentiality is fully protected under the regulations because it can be asserted on a conversation-by-conversation basis and that this does not place an impermissible burden on Mr. Nixon. In its view, "[w]hether particular material [*i.e.,* conversations] implicates the privilege depends on whether disclosure will affect the flow of executive discussion, a complex judgment best made by the incumbent President," and that given "the incumbent's superior ability to perceive threats to the privilege, . . . the Executive Branch may well raise a challenge when such threats appear, thereby alleviating Mr. Nixon's burdens." Pet. App. A at 27a-28a. This *assumption,* for which the court below again had no basis other than pure surmise, reflects a less than informed understanding of the incumbent's responsibilities. To suggest that the incumbent will have the time or inclination to review the Nixon White House tapes on a conversation-by-conversation basis to decide whether to assert the confidentiality privilege is fanciful.

ing these recordings, however, impermissibly intrudes upon the very rights this Court sought to protect. It also overlooks less intrusive means for implementing the goals of the Act.

The court of appeals concluded that there were only two alternatives for identifying Mr. Nixon's diaries: either the "triggering phrase" method proposed by Mr. Nixon[7] could be used, or the archivists would have unlimited discretion to review the diaries in whatever manner they deem necessary, including word-by-word review. Having framed the issue this way, the court chose the latter because, in its view, the Administrator might not be able to identify all diary entries by use of the "triggering phrase" method. The court ignored a third, less intrusive possibility: use of the "triggering method" whenever it fulfills the task, with access to such portions of the dictation as are necessary to determine its character only when the "triggering phrase" method is actually inadequate.

Neither the Administrator nor the courts below considered this alternative. The court of appeals could not assume that the archivists would not abuse an unlimited discretion by listening to the recordings more than is necessary to identify them. *See Couch v. United States*, 409 U.S. 322, 350 (1973) (Marshall, J., dissenting). The

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[7]Mr. Nixon had explained in an affidavit in the district court that he began his personal and official dictation with different "triggering phrases." A dictation relating to official business generally would be preceded by a direction as to whom the memorandum was addressed. His diary dictation, however, was addressed to no one, was commenced on a new dictabelt, was not commingled with non-diary dictation, and generally was introduced by a phrase such as "eleven twenty-five; December eight. I called . . . ," or "March 9, 1972, Memorandum for the private file — not to be transcribed," or "this is the second tape dictated for file, not to be transcribed — at Camp David on Saturday afternoon, January 6, 1973."

Administrator and the archivist in charge of the Nixon materials project gave assurances that the proposed review would be limited to the extent "necessary to ascertain whether the dictabelt or tape constitutes a personal diary." But the Administrator pointedly refused to adopt regulations that would limit the archivists' discretion, either along the lines suggested by Mr. Nixon, or by forbidding word-by-word review.

3. In *Nixon v. Administrator, supra,* this Court highlighted two areas of factual inquiry essential to the resolution of Mr. Nixon's claims that eventual public access under the Act, as applied, violated the constitutional rights of the former President and of others. The first related to the impact of the challenged action on Presidential privilege, as viewed by the incumbent President (433 U.S. at 448-449); the second concerned the historical practice of other former Presidents and the expectations that have been created as a result of their experience (433 U.S. at 450-452). Mr. Nixon was denied discovery into both areas. The court of appeals not only upheld this curtailment of discovery, but proceeded *to rely* upon certain assumptions concerning those very factual areas, without support in the record and contrary to what Mr. Nixon had offered to prove through his attempted discovery. As a result, the claims now before this Court depend upon a factual record that petitioner was not permitted to develop.

This Court has emphasized the view of the incumbent President on the question of Presidential privilege. President Ford's approval of the Act and the Carter Administration's defense of its facial constitutionality were cited to refute Mr. Nixon's claims that the Act would harm the functioning of the Executive Branch. *See, e.g., Nixon v. Administrator,* 433 U.S. at 449 ("the incumbent President is vitally concerned with and in the best position to assess the present

and future needs of the Executive Branch, and to support invocation of the privilege accordingly"). Mr. Justice Powell underscored the significance of this point when he stated (433 U.S. at 503-504):

> The President no doubt will see to it that the interests in confidentiality so forcefully urged by The Chief Justice and Mr. Justice Rehnquist . . . are taken into account in the final regulations . . . . While the incumbent President has supported the constitutionality of the Act as written, there is no indication that he will oppose appellant's assertions of Presidential privilege as they relate to the rules that will govern the screening process and the timing of disclosure, and particularly the restrictions that may be placed on certain documents and recordings.

Despite this Court's pointed interest in the incumbent's views, Mr. Nixon was prohibited from asking the President's counsel for the incumbent's assessment of the impact of the general public's access to the tapes. Indeed, the court of appeals even relied upon the incumbent's failure to join in Mr. Nixon's claim as tending to weaken the force of that claim, Pet. App. A, at 20a, a conclusion that assumes that President Carter was aware of the regulation and had decided that its impact did not warrant legal or administrative challenges. Yet Mr. Nixon sought to disprove these assumptions by showing that the incumbent President had not been briefed concerning the regulation and that his White House Counsel opposed it.

Also important to this Court was the historical practice regarding the processing and release of records belonging to prior Presidents, which was relevant to assess the reasonableness of Mr. Nixon's expectation that the recordings of his Presidential conversations would be protected under

the Fourth Amendment. *See Nixon v. Administrator, supra,* 443 U.S. at 445-450. Indeed, the Court in *Nixon v. Administrator,* contemplated the possibility that restrictions on access might be promulgated (433 U.S. at 497):

> . . . consistent with traditional restrictions placed on access to Presidential papers, and that such restrictions could forbid public disclosure of any confidential communications between appellant and his advisors for a fixed period of years, or until the death of Mr. Nixon and others participating in or the subject of communications.

Mr. Nixon attempted to depose the Archivist and the Deputy Assistant Archivist (on whose affidavit the government and the lower courts relied) regarding archival restrictions on the tape recordings of Presidents Kennedy and Johnson, but he was barred by the district court from developing this factual area. While upholding the ban on discovery, the court of appeals relied on "facts" not in the record relevant to the precise issue to support its decision. Responding to Mr. Nixon's Presidential privilege argument, the court of appeals stated that "even more damaging" is the fact that the privilege "erodes with time" because "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding." Pet. App. A, 20a, *infra.* This statement, however, does not pertain to the confidential recordings of four other Presidents. In view of this Court's and the lower courts' apparent view of the importances of this factual area, Mr. Nixon should have had an opportunity to develop the factual record, rather than have his claims resolved on assumptions for which no factual support exists.

In *Public Affairs Associates, Inc. v. Rickover,* 177 F.Supp. 601 (D.D.C. 1959), *aff'd in part,* 284 F.2d 262 (1960), *rev'd and remanded,* 369 U.S. 111 (1962), *on remand,* 268 F.Supp. 444 (D.D.C. 1967), which involved the question of ownership of government-related papers, this Court remanded the case because the lower court, as here, had granted summary judgment without fully developing the record. This Court already has explicitly cited the kinds of factual information it believed relevant to determining the validity of the regulations under attack. Yet Mr. Nixon pointedly was prevented from obtaining such information. Given the historical precedent that these regulations will establish, and the importance of the rights and privileges at stake in this case, Mr. Nixon's claims may not be rejected on their merits without a fully developed factual record. Moreover, because archival processing of the Presidential materials has continued unabated throughout the pendency of this case, no interest will be jeopardized if this Court were now to remand the case to permit additional discovery. At minimum, such additional discovery will provide a more thorough factual setting in which to consider the issues raised in this case.[8]

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[8]Another area that would be an appropriate subject for further inquiry concerns the National Archives' ability to assure the security of the tape recordings if played at regional listening centers. While this case was pending below, the Archives began permitting the public to listen to the Watergate trial tapes at a reference room in the National Archives. Sometime after that practice commenced, Mr. Dick Tuck played for the news media copies of portions of those conversations, but refused to identify the source from which he obtained the recordings. The National Archives does not know whether Mr. Tuck surreptitiously re-recorded the tapes played in its reference room. Further discovery will explore whether and what security precautions the Archives contemplates in order to guarantee that its airing of hundreds of hours of Presidential conversations in regional listening centers will not pose a significant risk that multiple copies – inevitably to be commercially reproduced – will not be made.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the case should be set for plenary review, or the decision of the court of appeals should be vacated and the case remanded to the district court for further development of the facts.

Respectfully submitted,

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PETITIONER'S APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2453

RICHARD M. NIXON, APPELLANT

v.

ROWLAND G. FREEMAN, III as ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, et al.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 77-1395)

Argued January 22, 1981

Judgment entered this date

Decided February 9, 1982

McGOWAN, *Senior Circuit Judge:* In this appeal from the District Court's grant of summary judgment, former President Richard M. Nixon challenges the constitutionality of regulations promulgated by the Administrator of General Services to implement the Presidential Recordings and Materials Preservation Act ("Act"), 44 U.S.C. § 2107 note (1976). Following a pretrial settlement of some of his claims, Mr. Nixon limited his challenge in

the District Court to two features of the regulations: (1) the provision allowing public access to certain tape recordings, 41 C.F.R. § 105-63.404(c) (1980), and (2) the procedure by which government archivists plan to screen and identify tapes containing Mr. Nixon's personal diary. Mr. Nixon renews these claims on appeal, asserting violations of the Presidential privilege of confidentiality, his rights of political association under the First Amendment, and his privacy rights protected by the Fourth Amendment. He also contends that the District Court abused its discretion in limiting discovery after the submission of cross-motions for partial summary judgment.

We find Mr. Nixon's constitutional challenges unavailing. We also hold that, looking to the precise circumstances in which the issues arose, the District Court did not abuse its discretion in limiting Mr. Nixon's discovery efforts. The judgment of the District Court is, accordingly, affirmed.

I

The Act under which the challenged regulations were promulgated was itself the subject of an earlier suit by Mr. Nixon, and the background and decision in that case are relevant to his current contentions.[1] After Mr. Nixon resigned as President on August 9, 1974, the new administration halted the shipment to California of the Presidential materials accumulated during the Nixon Presidency. Negotiations between Mr. Nixon and the Administrator of General Services Administration (GSA) produced an agreement concerning the deposit and

[1] A more detailed account of the factual background can be found in the opinions of the three-judge District Court and the Supreme Court in Nixon v. Administrator, 408 F. Supp. 321, 329-34 (D.D.C. 1976), *aff'd*, 433 U.S. 425, 430-33 (1977).

custody of the materials. Before that agreement became effective, however, it was superseded by the Act, which became law on December 19, 1974.[2] The Act directed GSA

[2]The controversy over the Nixon materials prompted subsequent congressional reconsideration of the traditional disposition and preservation of Presidential materials. That reconsideration resulted in the passage of the Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523, 44 U.S.C. §§ 2201-2207 (Supp. III 1979), which "terminate[s] the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition." H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. 2 (1978). The Act is effective only with respect to Presidential records created during a term of office beginning on or after January 20, 1981. Pub. L. No. 95-591, § 3, 92 Stat. 2528 (1978). Section 2202 reserves to the United States complete ownership, possession, and control of Presidential records, and directs that the records be administered in accordance with the provisions of the Act. Section 2203(a)-(b) directs the President, while in office, to ensure adequate documentation of his official activities, and to categorize and file appropriately those documents to the extent practicable. The section also restricts the President while in office from disposition of materials that he thinks have no historical or other informational value unless he obtains the opinion of the Archivist of the United States, and unless the Archivist chooses not to consult with certain congressional committees over the proposed disposal. *Id.* § 2203(c). If the Archivist does undertake such consultation, the President can dispose of the materials only after submitting to the appropriate congressional committee a schedule of the disposal. *Id.* § 2203(d).

When a President leaves office, the Archivist is to assume responsibility for controlling, preserving, and making available to the public the Presidential materials. The Archivist has an "affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." *Id.* § 2203(f)(1).

The President, while in office, has a limited ability to restrict eventual public access to certain materials. Section 2204(a) allows him to specify restrictions on materials falling within certain enumerated categories, but no such restriction can exceed twelve years. During the period of restriction, the determination whether access to particular materials shall be restricted is to be made by the Archivist, after consultation with the President. *Id.* § 2204(b)(3). The President can challenge this determination in court. *Id.* § 2204(e).

to take custody of all tape recordings and other Presidential materials accumulated during the Nixon Presidency,[3] and directed the Administrator to promulgate regulations governing public access to the materials. § 101(b)(1). The Administrator was then to submit the regulations to Congress, and either House had the power to disapprove them within ninety days of their submission. § 104(b).

One day after the Act's passage, Mr. Nixon brought suit in the District Court, challenging the Act's constitutionality and seeking declaratory and injunctive relief against it. A three-judge District Court ruled that the Act on its face did not violate the Constitution, *Nixon v. Administrator,* 408 F. Supp. 321 (D.D.C. 1976). The Supreme Court affirmed, *Nixon v. Administrator,* 433 U.S. 425 (1977).

The Supreme Court emphasized that its holding was limited to the facial constitutionality of the Act. *Id.* at 436-39. Because regulations governing public access could take a variety of forms, the Court did not address the constitutionality of any particular provision for public access. Instead, the Court primarily examined the Administrator's taking custody of and screening the materials. Other constitutional questions would be appropriate for judicial resolution only in the context of a challenge to regulations implementing the Act's broad provisions.

Mr Nixon initiated such a challenge – the action now before us – in the District Court on August 10, 1977, seeking declaratory and injunctive relief against regulations promulgated by the Administrator to implement several provisions of the Act. On August 19, 1977, Mr. Nixon amended his complaint to include a challenge to

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[3]These Presidential materials, it was estimated, consist of some 42 million pages of documents and 880 tape recordings. Nixon v. Administrator, 433 U.S. 425, 430 (1977).

certain revisions made to the regulations. J.A. 19. On December 16, 1977, the Administrator announced that regulations implementing section 104 of the Act, which governs public access to the materials, had become effective, having lain before Congress for ninety days without receiving the disapproval of either House. 42 Fed. Reg. 63626 (1977).[4] To consolidate the claims of the first amended complaint with his challenges to the more recent set of regulations, Mr. Nixon filed on January 31, 1978, a second amended complaint. J.A. 33.

On June 14, 1978, in response to a single motion, the court granted defendant-intervenor status to the Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald G. Herzberg, William Leuchtenberg, Arthur Link, J. Anthony Lukas, Austin Ranney, and Clement E. Vose. J.A. 13. Thereafter the parties reached a settlement agreement on February 14, 1979, which called for certain amendments to the regulations and disposed of all of Mr. Nixon's challenges but those concerning the creation of archival listening centers, 41 C.F.R. § 105-63.404(c) (1980), and archival screening of tapes and dictabelts containing

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[4]The set of regulations that became effective on this date was the fourth set of public access regulations submitted by the Administrator to Congress. The first set, submitted on March 19, 1975, was disapproved by the Senate on September 10, 1975. S. Res. 244, 94th Cong., 1st Sess. (1975). *see* S. Rep. No. 94-368, 94th Cong., 1st Sess. (1975). Congress received the second set on October 15, 1975, and the Senate disapproved several regulations concerning public access on April 8, 1976. S. Res. 428, 94th Cong., 2d Sess. (1975); *see* S. Rep. No. 94-748, 94th Cong., 2d Sess. (1978). On April 13, 1976, the Administrator submitted revised versions of those disapproved regulations, all but one of which the House disapproved on September 9, 1976. H. Res. 1505, 94th Cong., 2d Sess. (1976); *see* H.R. Rep. No. 94-1485, 94th Cong., 2d Sess. (1976).

Mr. Nixon's personal diary. J.A. 95. By the terms of the settlement, the parties agreed to litigate these two issues while the revised portions of the regulations were submitted to Congress for approval.[5]

To implement the agreement, Mr. Nixon filed a third amended complaint on March 7, 1979, counts I and II of which were to be dismissed when the revised regulations became effective. J.A. 183. Because neither House disapproved of the revised regulations within ninety days of their submission, those regulations became effective on March 7, 1980. 45 Fed. Reg. 14856 (1980).

At the time Mr. Nixon filed the third complaint, he also submitted a schedule for disposition of the two unsettled issues. The schedule suggested a brief period for discovery of material "reasonably necessary for filing of dispositive motions," followed by the filing of plaintiff's motion for summary judgment and defendants' opposition or cross-motion for summary judgment. J.A. 190. The court accepted this schedule on March 14, 1979. After the Administrator responded to Mr. Nixon's interrogatories and requests for admissions, Mr. Nixon on May 4, 1979, moved for summary judgment on counts III and IV of his third amended complaint. J.A. 225. Because the settlement agreement provided for the dismissal of counts I and II when Congress approved the revised regulations, the May 4 motion, though styled a motion for partial sum-

[5]The settlement agreement also provided that neither plaintiff nor defendants would rely on the one-House veto provision of the Act to argue for or against the constitutionality of the regulations. J.A. 97. Mr. Nixon contends that defendants breached this agreement by submitting to the court, prior to judgment, memoranda arguing that congressional acquiescense to the regulations supported their validity. Because the one-House veto does not bear upon our analysis, we need not address Mr. Nixon's contention.

mary judgment, sought summary judgment on both of the remaining contested issues.

Shortly after filing that motion, on May 8, 1979, Mr. Nixon sought leave to depose Robert Lipshutz, White House Counsel, to discover whether the White House possessed "any materials relevant to the tapes access issue." J.A. 273. The Administrator objected to this effort, and the court denied Mr. Nixon's motion. J.A. 15. On June 1, 1979, the Administrator filed a cross-motion for partial summary judgment, J.A. 289, and the intervenor-defendants filed such a motion on June 8, 1979, J.A. 337. Mr. Nixon then attempted further discovery. He noticed the depositions of the Archivist and Deputy Archivist of the United States, and subpoenaed from those individuals all documents "pertaining to the gifts or other transfers of tape recordings involving Presidents Kennedy and Johnson to the National Archives and any agreement, plan, or consideration given to the question of public listening to those recordings." J.A. 362, 363. The Administrator responded by moving for an order quashing the subpoenas and for a protective order prohibiting further discovery until the court had resolved the cross-motions for partial summary judgment. J.A. 365. On June 24, 1979, the court granted the Administrator's motion, J.A. 16, and on July 23, 1979, issued an order granting defendants' motions for partial summary judgment. J.A. 17. After Mr. Nixon moved for reconsideration of the order, the court issued on October 12, 1979, another order denying Mr. Nixon's motion and entering final judgment against him J.A. 18.[6] Mr. Nixon then filed this appeal.

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[6]The October 12 order also stated that there had been no breach of the settlement agreement. *See* note 5 *supra.*

II

In reviewing Mr. Nixon's claims in the context of an appeal from the District Court's grant of summary judgment, we are mindful of our obligation to uphold the District Court only if there is no genuine issue of material fact requiring more intensive exploration of Mr. Nixon's claims. Fed. R. Civ. P. 56(a). We proceed, therefore, to inquire whether, on the record before us, the defendants were entitled to judgment as a matter of law on both the issue of public access to tape recordings and the issue of archival screening of diary material.

Although Mr. Nixon limits his challenge to these two aspects of the regulations, an evaluation of his claims requires an understanding of the system of processing and public access created by the regulations. The regulations apply to all the "Presidential historical materials of the Nixon Administration," 41 C.F.R. § 105-63.102 (1980), defined to include all materials "made or received by former President Richard M. Nixon or by members of his staff in connection with his constitutional or statutory powers or duties as President and retained or appropriate for retention as evidence of or information about these powers or duties." *Id.* § 105-63.104(a). The Administrator is to begin the initial archival processing, *id.* § 105-63.401(a), which consists of arranging, indexing, transcribing, and reproducing materials, as well as identifying materials requiring further processing and identifying and preserving materials in poor physical condition. *Id.* § 105-63.104(h).

This initial processing is the first step of the regulations' detailed scheme for identifying those materials to which the public may have eventual access, and for opening such materials to the public. In brief outline, those procedures

call for the archivists, during the initial processing period, to segregate from the Presidential materials any material determined to fall within one or more of several categories. If a certain segment of materials falls in none of those categories, the Administrator is to move toward opening the material to public access. At least thirty days before the opening, the Administrator must publish notice of it in the Federal Register, and then receive and determine any challenge to the proposed opening.

The archivists assigned by the Administrator have sole responsibility for making the initial determination whether materials should be segregated or otherwise restricted from public access. *Id.* § 105-63.401-2(a)-(c). The regulations give detailed guidance as to both the types of materials the archivists are to separate and the procedure for making the determination to segregate. First, the archivists are to give priority to segregating "private or personal materials" and transferring them to their owner, *id.* § 105-63.401-2(a).[7] Second, the archivists are to segregate materials that neither relate to "abuses of governmental power"[8] nor otherwise have "general historical

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[7]These materials are defined as "those papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other nongovernmental activities, including private political associations, and having no connection with his constitutional or statutory powers or duties as President or as a member of the President's staff." 41 C.F.R. § 105-63.104(b) (1980).

[8]The regulations define these materials as those concerning the alleged acts, whether or not corroborated by judicial, administrative or legislative proceedings, which allegedly were conducted, directed or approved by Richard M. Nixon, his staff or persons associated with him in his constitutional or statutory functions as President, or as political activities directly relating to or having a direct effect upon those functions, and which (1) were within the purview of the charters of the Senate Select Committee on Presidential

significance."[9] *Id.* § 105-63.401-2(b). Third, the archivists are to segregate materials subject to certain enumerated restrictions.[10]

If the archivists are unable to determine whether certain material falls within one of these categories, or if the archivists conclude that the determination will raise a signifi-

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Campaign Activities or the Watergate Special Prosecution Force; or (2) are circumscribed in the Articles of Impeachment adopted by the House Committee on the Judiciary and reported to the House of Representatives for consideration in House Report No. 93-1305.

Id § 105-63.104(c).

[9]These materials are defined as those "having administrative, legal, research or other historical value as evidence of or information about the constitutional or statutory powers or duties of the President, which an archivist has determined is of a quality sufficient to warrant the retention by the United States of materials so designated." *Id.* § 105-63.104(d).

[10]A different, and generally less protective, set of restrictions applies to materials concerning "abuses of governmental power" than to materials having only "general historical significance." Both types of materials are to be restricted when (1) the Administrator is in the process of determining a challenge to proposed access to the material, (2) release of the material would violate a federal statute, and (3) the materials are authorized to be kept secret under criteria established by Executive Order. *Id.* §§ 105.63.402-1, 105-63.402-2(a). The Administrator may waive this last restriction under certain conditions. The Administrator is also to restrict materials relating to abuse of governmental power when their release would constitute a clearly unwarranted invasion of personal privacy, subject to the condition that the Administrator will make available those portions that are essential to an understanding of abuses of governmental power. *Id.* § 105-63.402-1(b).

If materials have only general historical significance, the Administrator is also to restrict them when their release would (1) disclose privileged or confidential trade secrets or commercial information, (2) constitute libel or a clearly unwarranted invasion of personal privacy, or (3) disclose investigatory materials compiled for law enforcement purposes, but only under certain circumstances. *Id.* § 105-63.402-2(b).

cant issue of interpretation or have far-reaching precedential value, they are to submit the matter to the Senior Archival Panel. *Id.* § 105-63.401-2(d). That panel of archivists, whose members are chosen by the Archivist of the United States, then has the sole responsibility for making the initial determination. If the panel, however, is also unable to make the determination, or is also struck by the significance of the required interpretation, the panel is to submit the matter to the Presidential Materials Review Board. That five-member board, which includes as Chairman the Archivist of the United States, then becomes responsible for making a determination, whose finality depends on the type of issue involved. If the Board must determine whether materials are "private or personal," or whether materials neither relate to "abuses of governmental power" nor otherwise have "general historical significance," the Board is to make the final administrative determination, in the form of a written decision together with any concurring and dissenting opinions. *Id.* § 105-63.401-2(g). If the required determination involves other enumerated restrictions, the Board is to recommend an initial decision to the Senior Archival Panel, which retains the sole responsibility for the initial determination. *Id.* § 105-63.401-2(h).

Once material forming an "integral file segment"[11] has undergone initial processing and has escaped segregation as described above, the Administrator must prepare to open the segment to public access "[a]s soon thereafter as possible." *Id.* § 105-63.401(a). The Administrator must

[11]The Nixon Materials Archival Processing Manual, which describes certain processing procedures that the parties agreed upon, states that the phrase "integral file segment" ordinarily refers to "an archival determination that a particular group of processed documents constitutes an intelligible and complete unit for purposes of historical research." J.A. 164.

publish notice of the proposed opening, at least thirty days before its occurrence, in the Federal Register, reasonably indentifying the material and including a reference to the right of any person to file a claim objecting to the publication. Copies of that notice are to be sent to Mr. Nixon, his designated agent, or his heirs. *Id.* § 105-63.401(b). Within thirty days of the publication of the notice, any person claiming a constitutional or legal right or privilege that would limit public access must notify the Administrator of that right. *Id.* § 105-63.401-1(a). The procedure for resolving such a claim depends on its content. Unless the claim states that the materials are private or personal, the Administrator is to make the decision regarding access. *Id.* If the claim alleges that the materials are private or personal, the Administrator is to transmit the claim to the Presidential Materials Review Board. *Id.* § 105-63.401-1(d). Upon receiving such a matter, the Board must notify the claimant of its impending consideration of the claim, and allow him to supplement his reasons for the claim. The Board must also publish notice of its consideration in the Federal Register, and then receive and take into account the views of any member of the public respecting the public or private nature of the materials. After considering all the positions put forth, the Board must issue a decision, including any concurring or dissenting opinions, that serves as the final administrative decision on the matter. *Id.* § 105-63.401-2(i).

Whenever the Administrator receives a claim that a proposed access will violate a legal or constitutional right, the material at issue is to be restricted until determination of the claim. *Id.* §§ 105-63.402-1(a)(1), 105-63.402-2(a). If that determination is adverse to the claimant, the Administrator must refrain from opening the material to public access for at least thirty days after the claimant receives notification of the decision. *Id.* § 105-63.401-1(a),

(d). The regulations do not discuss judicial review, but section 105(a) of the Act grants exclusive jurisdiction to the United States District Court for the District of Columbia to hear and expedite challenges to such determinations.

The Presidential material determined by the above-described procedure to be open to the public then becomes available for public reference in locations and under rules that the Administrator shall prescribe. *Id.* § 105-63.403. In particular, the regulation challenged by Mr. Nixon states that researchers may listen to reference copies of tape recordings at the National Archives Building in Washington, D.C., and at other locations chosen by the Administrator. *Id.* § 105-63.404(c). Pursuant to that authority, the Administrator has designated eleven archival centers throughout the country at which the public may listen to copies of tape recordings. The regulations, however, do not allow members of the public to reproduce the tapes. *Id.* § 105-63.405(a).

The description of the regulatory scheme would not be complete without some discussion of additional processing procedures agreed upon by the parties, as well as the processing already undertaken by the Administrator and his staff of archivists. By the terms of the February 14, 1979, pretrial settlement, the parties agreed on certain procedures that the Administrator would employ in carrying out his processing responsibilities under the regulations. These procedures, set forth in the "Nixon Materials Archival Processing Manual," call for three phases of archival processing.

In Phase I processing, the archivists examine the materials essentially to establish physical and documentary control over them. This phase includes, for example, the development of preliminary finding aids, the correction of physical deterioration, the rewinding of original

tapes, and the duplication of tapes while monitoring them for sound quality. Affidavit of Richard A. Jacobs, Deputy Assistant Archivist and Acting Director of the Nixon Presidential Materials Project, J.A. 292 [hereinafter "Jacobs Affidavit"]. Phase I processing had been completed at the time the District Court considered the parties" cross-motions for partial summary judgment.

The main purpose of Phase II processing is to develop more sophisticated finding aids to the materials, including folder title lists, series descriptions, and a general subject log. This phase requires archivists to listen to the tapes and note the time of the conversation, the participants, and the subject of the discussion. *Id.*, J.A. 293-94. At the time the parties filed motions for partial summary judgment, Phase II processing was underway. The archivists, however, had voluntarily foregone Phase II processing of any dictabelts because Mr. Nixon claims to have dictated his diary primarily onto dictabelts. *Id.*, J.A. 293.

Phase III processing consists of the final archival tasks necessary to prepare the materials for public access. During this phase the archivists review the materials for the purpose of identifying and segregating the materials not subject to public access. As of several weeks before the District Court entered judgment against Mr. Nixon, no Phase III processing had yet taken place. *Id.*

III

Mr. Nixon argues that the regulations' provision for the creation of archival centers where members of the public can listen to copies of certain tape recordings infringes a number of constitutionally based interests: his personal privacy interest in the recordings to be made public, his right to political privacy guaranteed by the First Amend-

ment, and the Presidential privilege of confidentiality. The constitutional nature of these interests, so it is said, requires that any regulations necessary to implement the Act's purposes do so in the manner least intrusive to the constitutionally rooted interests implicated by those regulations. According to Mr. Nixon, Section 105-63.404(c) fails in this respect because the Administrator could have chosen means for providing public access to the tape-recorded messages that would fully serve the Act's purposes yet infringe less severely on Mr. Nixon's constitutional interests. For example, the Administrator could have allowed public access only to synopses or transcripts of the tapes, could have made available to the public only those tape recordings relating to Watergate, or could have restricted the availability of the recordings for a fixed period of years.

A.

Insofar as Mr. Nixon premises the regulation's invalidity on its alleged invasion of his constitutional right of privacy, his argument has little force. He defines the privacy interest on which his claim rests not as the right of privacy that attaches to particular private or personal materials such as diaries and letters, but rather as a right of an individual to operate personal and business affairs within a "zone of privacy," out of the public's view or listening. Appellant's Brief, at 21. Mr. Nixon, however, can claim no such broad right of privacy with respect to his life while President. For Presidents and ordinary citizens alike, a personal privacy interest protected by the Fourth Amendment must find its source in a legitimate expectation of privacy. *Katz v. United States*, 389 U.S. 347, 351-53 (1967); *Nixon v. Administrator*, 433 U.S. at 457-58. Mr. Nixon while President could have had such an

expectation in some materials, such as diaries or other communications respecting personal matters unrelated to his public duties, *id.*, but not in materials relating to the conduct and official duties of the Presidency, *id.* at 459.

Since the regulations charge the archivists with identifying and returning to Mr. Nixon private or personal material, and provide a procedure for asserting constitutionally based objections to any public access, the archival listening center regulation will not result in the public's listening to recordings implicating Mr. Nixon's privacy rights.

Mr. Nixon disputes this conclusion by arguing that he has a personal privacy interest even in those tapes pertaining to the official business of the Presidency. He argues that to conclude otherwise is to focus improperly on the content of the communication, rather than on the communicant's expectation of privacy. But the distinction between personal or private communications and communications relating to the official business of the Presidency rests upon the recognition that the public trust historically attaching to official Presidential materials and a President's assumption of a public role undercut the reasonableness of a president's expectation of privacy in official materials. *Id.* at 455; *Nixon v. Administrator,* 408 F. Supp. at 358-59 & n.53.

Mr. Nixon attempts to avoid this conclusion by distinguishing the instant challenge from *Nixon v. Administrator.* Here, he argues, his challenge is not limited, as it was in that case, to mere archival screening, but concerns actual public listening to the tapes. The fact that public access is the subject of this challenge, however, does not make more persuasive Mr. Nixon's attempt to assert a privacy interest in tapes relating to the official

business of the Presidency. Such materials are deemed nonprivate precisely because of the public's traditional interest in and eventual access to them, as well as a President's voluntary assumption of his role as public leader. Nor does the form of the public access challenged here aid his privacy argument. The fact that the public can listen to the tapes, rather than read transcripts or synopses, does not allow him to assert a personal privacy interest in otherwise nonprivate materials.

B.

We reach a similar conclusion with respect to Mr. Nixon's claim that the regulation infringes his rights of associational privacy protected by the First Amendment. As the Supreme Court recognized in *Nixon v. Administrator,* Mr. Nixon while President could legitimately have expected a chance to remove from the public's eye documents concerning his private political associations. 433 U.S. at 466. The tapes, therefore, undoubtedly contain some matters falling within the First Amendment's protection of involvement with partisan politics, *Buckley v. Valeo,* 424 U.S. 1 (1976). But the regulations charge the archivists to give priority to separating and returning to Mr. Nixon "private and personal materials," which are defined to include materials relating solely to private political associations. 41 C.F.R. § 105-63.104(b) (1980). Even if an archivist determines that a tape does not fall within that category, no disclosure will occur until after Mr. Nixon has had a chance to appeal the determination both administratively and judicially.

C.

Mr. Nixon also claims that the listening center regulation overbroadly infringes upon the Presidential privilege of confidentiality. In elaborating on this privilege in *United States v. Nixon,* 418 U.S. 683 (1974), the Supreme Court distinguished between claims of privilege in particular communications including military, diplomatic, or national security interests, and the broader and undifferentiated claim of interest in preserving the confidentiality of executive determinations. *Id.* at 706.[12] The latter privilege flows from the recognition that fear of disclosure may chill the candid advice and discussion necessary to effective decisionmaking. *Id.* at 705-06. Hence, a court faced with a claim based on the privilege must ask whether the regulation would impair the ability of present and future Presidents to obtain the confidential discussion and advice necessary to effective discharge of their duties. Any such impairment, however, must be balanced against the adverse impact that recognition of the privilege would have on the legitimate congressional purposes furthered by the Act. *Nixon v. Administrator,* 433 U.S. at 447.

Mr. Nixon argues that this balancing requires invalidation of the listening center regulation, because the Ad-

[12]Although Mr. Nixon's arguments appear to center on an alleged infringement of the latter, broader claim of privilege, we should note that the listening center regulation does not violate executive privilege as more narrowly defined. The archivists have an affirmative obligation generally to restrict materials authorized to be kept secret under criteria established by Executive Order, as well as materials whose disclosure would violate a federal statute. 41 C.F.R. §§ 105.63.402-1(a)(3)-(4), 105.63-402-2(a) (1980). Moreover, by means of the procedure described above, the regulations allow Mr. Nixon to assert any constitutional or legal right or privilege that would limit disclosure, and require restriction until resolution of such a claim.

ministrator was obligated to consider, and could have chosen, less intrusive means of accomplishing the Act's purposes, such as:

> (1) making public only Watergate-related tape recordings;
>
> (2) making public only transcripts or synopses of tape recordings;
>
> (3) restricting access to non-Watergate-related tapes (or transcripts) for a fixed period of years;
>
> and
>
> (4) variations on the first three proposals, such as allowing immediate access only to synopses of Watergate-related tapes.

In measuring the degree to which the regulation infringes on the privilege, we note again that the regulations allow public access only to certain materials. The screening archivists will not even propose to open material to public access until they or reviewing archivists have determined that the material is not private or personal. 41 C.F.R. § 105-63.401-2(a) (1980). In addition, they cannot recommend access until they have decided that the material is not subject to any of the restrictions enumerated in the regulations, one of which relates to material that would "constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person." *Id.* §§ 105-63.402-1(b), 105-63.402-2(b) (2). Proposed disclosure of materials determined to fall within none of these categories is then subject to challenge by any person claiming a constitutional or legal right or privilege that would limit disclosure. *Id.* § 105-63.401-1(a). No tape will be made public, therefore, until Mr. Nixon and any others whose rights or privileges are implicated by disclosure have had and opportunity to object to disclosure and obtain judicial review of any adverse determination.

The opportunity to challenge particular disclosures, of course, does not guarantee that whatever access is eventually allowed will have no adverse effect on the Presidential privilege of confidentiality. Even if public access to a given segment of materials presented little threat of chilling executive discussion now and in the future, one could argue that public access to many segments has some such effect.

Whether the infringement Mr. Nixon alleges is viewed as resulting from particular disclosures or from their cumulation, we see several reasons for discounting its seriousness. As the Supreme Court noted in *Nixon v. Administrator,* an incumbent President is best situated to judge when disclosure will adversely affect his receipt of candid advice and discussion. 433 U.S. at 449. Although a former President may assert the privilege, the incumbent's failure to mount a similar challenge at the time Mr. Nixon brought this suit weakens the force of the former President's claim. *Id.*

Even more damaging to Mr. Nixon's claim is the fact, emphasized by the Court in *Nixon v. Administrator,* that the privilege he asserts is not a fixed and permanent one, but erodes with the passage of time. Citing the research of the three-judge District Court, the Supreme Court noted that "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding." *Id.* at 450. As the District Court observed in *Nixon v. Administrator,* Mr. Nixon, like every President before him since Herbert Hoover, plans to deposit Presidential materials in a Presidential library, and he installed the taping system in part to aid him in preparing memoirs. 408 F. Supp. at 345-46. Although there is no fixed number of years that can measure the duration of the

privilege, it is significant that no public access will occur until at least eight years after the event disclosed.[13]

The purposes furthered by the regulations, moreover, are those that the Supreme Court in *Nixon v. Administrator* found to be ample justification for the Act. Broadly formulated, those interests relate to the importance of preserving "an accurate and complete historical record." 433 U.S. at 452 n.14 (quoting 408 F. Supp. at 349). That goal furthers the general public's need for full airing and understanding of the events of the Nixon Presidency, as well as Congress's interest in understanding the functioning of the political process during that time. 433 U.S. at 453.

Congress viewed public access as furthering these interests. In section 104(a) of the Act, it charged the Administrator to take into account seven factors, which included "the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate,'" and "the need to provide public access to

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[13]Although not determinative of the issue before us, it is instructive to note the comments of the House Committee on Government Operations in recommending the bill that became the Presidential Records Act of 1978, *see* note 2, *supra*. The Committee Report noted that a major theme during hearings on bills relating to Presidential records was "balancing ready availability of the records against the prospect that premature disclosure might have a 'chilling effect' on Presidents and the frankness of advice they could expect from their staffs." H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. 8 (1978). Most witnesses, the Report added, felt that "a period of 10 years or less in which the President could assert some restrictions would be sufficient to accommodate these policy and legal concerns." *Id.* at 9. Congress eventually chose to allow Presidents to designate restrictions on certain materials for a maximum period of twelve years, but made the Archivist responsible for determining whether particular matters fall within those restrictions. *See* note 2 *supra*.

those materials which have general historical significance . . . ."

We disagree with Mr. Nixon's argument that the Administrator chose overbroad means of accomplishing these congressional goals. It is true that all of Mr. Nixon's suggestions for alternative means of public access are more protective of the tapes than are the regulations; the question, however, is whether these forms of guarding the tapes add any necessary protection to the privilege of confidentiality.[14] We cannot conclude that these proposals represent any further safeguard of the privilege significant enought to justify their interference with the Act's goal of public access. Indeed, we think that some of Mr. Nixon's alternatives add no meaningful protection to the privilege at all.

We need not draw on disputed empirical evidence to conclude that reading transcripts or synopses, no matter how conscientiously or expertly made, is less effective a form of public access than listening to the tapes themselves. To name but a few of the differences between

[14]Most of Mr. Nixon's proposals are more restrictive of materials relating to "general historical significance" than of those relating to Watergate. Mr. Nixon is correct in discerning a congressional emphasis on providing public access to Watergate-related materials; the Act refers to the need for public access to those materials "at the earliest reasonable date." § 104(a)(1). But Mr. Nixon is wrong in reading into this emphasis a negative emphasis on providing public access to materials of general historical significance; the Act also refers to "the need to provide public access to those materials."§ 104(a)(6). Apparently Mr. Nixon reads the language requiring the "earliest reasonable" access to Watergate-related materials as allowing delayed access to other historically significant material. That reading is not a supportable one. Congress may have wanted the Administrator to give priority to processing Watergate-related materials and preparing them for public access. That wish, however, does not imply congressional acquiescence to delayed public access to other historically significant materials whose processing has been completed by the archivists.

the spoken and written word, phrases may be inaudible or indiscernible, inflections may vary the meaning of a particular word or phrase, and silences or pauses may form part of a conversation's content. Even Mr. Nixon's counsel, who by his own account has listened to many of the Presidential tapes, has stated that many portions of the tapes are of poor quality and are often unintelligible. He claims, nonetheless, that transcripts or synopses are as effective as or superior to tapes.

> "I do not believe that direct access to the recordings significantly increases the listener's ability to understand the conversation, either as to its drama, content or any other factors . . . . [I]t is literally impossible to resolve disputes as to the content of much of the recordings."

Affidavit of R. Stan Mortenson, J.A. 382-83. We think this view misses the point. If a statement is inaudible or ambiguous, the ability to listen and form one's own conclusion rather than rely on another's rendition furthers the congressional goal of providing the public with full information about the Nixon Presidency.

In addition, we doubt seriously that making transcripts or synopses available instead of tapes would lessen any threat to the privilege of confidentiality posed by disclosure of the tape's contents. Presumably such transcripts or synopses would represent attempts to convey, in written form, the full content of the taped material. Any difference between the taped message and its written formulation would likely represent a difference of completeness or accuracy, not any difference even arguably relevant to protecting confidential matters.

Many of Mr. Nixon's alternative access proposals also call for restricting access to at least some of the tapes for a

fixed period of years. He suggests, for example, limiting access to non-Watergate-related tapes for twenty-five years, or until the death of the participants or those who were the subject of the conversation. These suggestions are reminiscent of Justice Powell's concurring opinion in *Nixon v. Administrator,* which, written "with an eye toward the kind of regulations . . . that would be consistent with the Act and yet that would afford protection to the important constitutional interests" at stake, suggested certain features that the regulations might contain. 433 U.S. at 495-96 (Powell, J., concurring). Quoting the District Court, Justice Powell wrote that "substantive restrictions on access might be adopted, consistent with traditional restrictions placed on access to Presidential papers, and that such restrictions could forbid public disclosure of any confidential communication between [Mr. Nixon] and his advisors 'for a fixed period of years, or until the death of Mr. Nixon and others participating in or the subject of communications.'" *Id.* at 497 (quoting 408 F. Supp. at 338).

Keeping in mind the complete regulatory scheme and Justice Powell's suggestions, we think that the regulations adequately protect the privilege of confidentiality without adoption of Mr. Nixon's proposals. First, to some extent, the time restriction proposals aim to protect privacy interests of participants in or subjects of conversations. Those privacy interests, however, find ample protection in the various affirmative duties of archivists to restrict materials implicating privacy rights, and in the opportunity of individuals to assert privacy-based challenges to particular disclosures. Second, we have difficulty concluding that imposing a blanket time restriction of, say, twenty-five years would represent enough additional protection to the privilege to justify the serious denial of public access that would result from the restriction. This conclusion

becomes apparent when we recall that Mr. Nixon would add this restriction to a regulatory scheme that, as described above, already requires restriction of certain classes of material, not unlike the system of restrictions to which Justice Powell referred.[15]

Moreover, the regulations allow Mr. Nixon to raise his claim of privilege with respect to particular disclosures before they occur. As we recognized earlier, one could argue that a system allowing individual challenges cannot effectively guard against some cumulative effect of disclosures. To adopt a blanket time restriction for that reason, however, would require us to believe that those tapes which survive restriction pursuant to archival segregation and outside challenge, and which contain conversations occurring at least eight years ago, nonetheless pose a threat to executive decisionmaking great enough to justify and additional twenty-five years of restriction.[16]

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[15]Quoting the District Court, Justice Powell set forth a basic set of donor-imposed access restrictions followed by several recent Presidents. 433 U.S. at 497 n.3. That set, quite understandably, is not as complex as the nonvoluntary scheme of restrictions set forth in the regulations. For example, the categories of restrictions in the regulations generally apply more forcefully to material of general historical significance unrelated to abuse of governmental power. Nonetheless, some instructive similarities exist between the regulations and the restrictions mentioned by Justice Powell. Both sets provide protection for material affecting national security and governmental affairs, 41 C.F.R. §§ 105-63.402-1(a)(4), 105-63.402-2(a) (1980); personal or private materials, *id.* § 105-63.401(a); and materials containing statements violative of the privacy rights of others, *id.* §§ 105-63.402-1(b), 105-63.402-2(a), (b)(2). The regulations contain no counterpart to the donor-imposed restriction on materials "containing statements made by or to a President in confidence," 433 U.S. at 497 n.3, but they allow anyone to assert any constitutional or legal privilege implicated by such statements. 41 C.F.R. § 105-63.401-1(a) (1980).

[16]His claim that less intrusive means were available to the Administrator leads Mr. Nixon to a related argument. He contends that

In addition to arguing that his proposals represent less intrusive means of accomplishing the Act's objectives, Mr. Nixon claims that only some more restrictive form of access will respect what the Supreme Court recognized as the "presumptive" nature of the privilege. *United States v. Nixon,* 418 U.S. 683, 708 1974). The challenged regulations are deficient in that regard, he charges, because they place upon him the burden of coming forward to challenge any disclosure that he thinks will violate the privilege. To remedy this deficiency, he proposes that the regulations include (1) a requirement that would-be listeners show "particularized need" for hearing the tapes, thus removing from Mr. Nixon the burden of challenging each disclosure; (2) a requirement that archivists affirmatively identify and segregate material implicating the privilege, much like the regulation requiring archivists affirmatively to restrict material falling within certain categories; or (3) a blanket time restriction.

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the Administrator, when drafting the regulations, gave insufficient consideration to these alternatives. Because Congress wanted the Act to be implemented in a constitutional manner, this inadequate consideration, Mr. Nixon argues, fell short of the Administrator's duty to consider all relevant factors, as required of agency action by the Supreme Court's decision in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). As is clear from our discussion of the less intrusive alternatives suggested by Mr. Nixon, the regulations are not defective in failing to include the features he suggests. Mr. Nixon seems to argue, nonetheless, that the Administrator violated the Act simply because he quickly rejected delayed public access as an alternative. Not only do we question the validity of Mr. Nixon's legal premise, *see* United States v. Morgan, 313 U.S. 409, 421-22 (1941), we find no fault in the Administrator's drafting the regulations with an eye toward providing public access to materials as soon as it is determined that disclosure of those materials will not violate any constitutional or legal right or privilege.

We disagree that the presumptive nature of the privilege requires adoption of any of these features. In *Nixon v. Administrator,* the Supreme Court rejected the argument that archival screening "reversed" the presumptive privilege, noting that the Act required the Administrator to preserve Mr. Nixon's right to assert the privilege. The Act's guidelines, the Court observed, were on their face "as broad as the privilege itself." 433 U.S. at 455. The same observation applies here; the regulations give Mr. Nixon the opportunity to challenge any disclosure on the basis of the privilege.

Mr. Nixon's proposals add nothing required by the presumptive privilege, even if we assume the existence of some cumulative effect of disclosure that cannot be easily challenged on an individual basis. It is true that the regulations do not contain a specific restriction requiring the archivists to segregate materials implicating the privilege, and that Mr. Nixon must assert the privilege on a disclosure-by-disclosure basis. But we think that this feature of the regulations is justified by the very nature of the privilege. Whether particular material implicates the privilege depends on whether disclosure will affect the flow of executive discussion, a complex judgment best made by the incumbent President. *Id.* at 449. We cannot see how the Administrator could have devised meaningful fixed criteria allowing archivists to make that difficult judgment.

We also see no justification for requiring the Administrator to condition access upon a showing of particularized need. We do not understand "presumptive" to mean that all the tapes in the Administrator's custody must be presumed fully to implicate the privilege, and that would-be listeners must override that presumption with a showing of need. Rather, we think that those who see in

disclosure a threat to the privilege must be given a meaningful opportunity to contest disclosure on that basis. The regulations give Mr. Nixon such an opportunity. He can raise a challenge by sending a letter to the Administrator explaining his position; only if his claim is rejected administratively need he present his claim in court. Moreover, recalling the Supreme Court's observations about the incumbent's superior ability to perceive threats to the privilege, *id.*, the Executive Branch may well raise a challenge when such threats appear, thereby alleviating Mr. Nixon's burdens.

IV

Before addressing Mr. Nixon's challenge to what he foresees as a "word-by-word" archival screening of his personal diary tapes, it is important to understand how that diary was created and stored, because those details are of considerable importance to Mr. Nixon's legal claims. During certain periods of his Presidency, from November 1971 until April 1973, and again in June and July 1974, it was Mr. Nixon's practice to dictate onto portable dictabelts or cassettes a verbal diary of the day's events. Affidavit of Richard M. Nixon, J.A. 226 [hereinafter "Nixon Affidavit"]. Although this dictation often consisted of personal reflections on activities relating to his official duties, he did not make this record to aid him in performance of those duties. Rather, he viewed the dictations as purely personal records. *Id.* at 227.

From November, 1971, until sometime in 1973, Mr. Nixon always dictated onto magnetic dictabelts, and always started each diary entry on a new dictabelt. He never dictated his diary onto dictabelts that also contained official dictation. *Id.* In 1973 Mr. Nixon began to dictate onto a portable cassette tape recorder, a practice that

allowed him to include on a single cassette more than one day's dictation. Even after switching to the use of cassettes, however, Mr. Nixon continued to dictate intermittently onto dictabelts. *Id.*

Mr. Nixon states that he "began each dictation in a way which would readily distinguish it from other documents and memoranda that [he] also put on dictabelts." *Id.* He did not, however, always employ the same distinguishing feature. According to Mr. Nixon, some of his diary dictations were distinguishable from official dictation only by the absence, rather than the presence, of certain phrases. For example, if dictating an official memorandum to his chief of staff, Mr. Nixon would begin the dictation with the phrase, "This is a memorandum to Bob Haldeman," or with other "words to that effect." *Id.* at 227-28. His diary entries are distinguishable, he says, because they contain no such prefatory statements. *Id.* at 228. In addition, some of the diary dictations began with "a statement of the date followed by the beginning of a recitation of events." *Id.*

As Mr. Nixon continued to make these diaries, he began "with greater regularity to preface them with opening remarks designating them as private." *Id.* These remarks, too, varied slightly. He might state, "March 9, 1972. Memorandum for the private file — not to be transcribed," or "Dictated for file, not to be transcribed — at Camp David on Saturday afternoon, January 6, 1973." *Id.* Apparently the time of day noted in these introductory phrases varied slightly, because not all his diary dictations were made at the end of the day. *Id.* at 226.

Mr. Nixon then would hand these dictabelts directly to his secretary, indicating in some way that the tape belonged to his private file. He would either note verbally

that the dictabelts were private, or attach a note to the dictabelt itself designating it as private. *Id.* at 228.

Sometimes Mr. Nixon dictated diary entries in the Oval Office and the Executive Office Building. Because those areas had room recording devices triggered automatically by voice, some of Mr. Nixon's diary dictations were also recorded by that taping system. *Id.*

As the Supreme Court noted in *Nixon v. Administrator,* the Presidential materials are in a commingled state. 433 U.S. at 459. Because Mr. Nixon used dictabelts to record official as well as personal matters, the mere physical features of dictabelts do not serve to distinguish diary from nondiary materials. At the time of the District Court's entry of judgment, the archivists had uncovered some 624 dictabelts either containing dictation by Mr. Nixon or located in files attributed to him. Jacobs Affidavit, J.A. 293. As we explained earlier, the archivists at the time of trial had completed "Phase I" processing of these dictabelts; that is, the dictabelts had been rewound, duplicated, and monitored for sound quality only. The archivists have voluntarily held in abeyance, until the outcome of this litigation, further processing of the dictabelts. They have, however, continued to process the cassettes, as well as the tapes made by means of the office taping system. These cassettes and tapes are also alleged to contain some of Mr. Nixon's diary dictations.

The parties are in agreement that, once diary material is identified by means of archival processing, the archivists must return the material immediately to Mr. Nixon. The regulations require no less, stating that the archivists, in processing the materials, are to give priority to segregating and returning private materials to their owner. 41 C.F.R. § 105-63.401(a) (1980) The parties disagree, however, on

the constitutionality *vel non* of the processing procedure by which the archivists propose to identify the diary material. Indeed, the parties differ even in their descriptions of that procedure. For that reason, we will outline the contested procedure with some care.

The archivists essentially propose to review the dictabelts and other tapes in the detail necessary to ascertain whether the dictabelt or tape constitutes a personal diary. Brief of Appellee Administrator of General Services, at 27 n.6; Jacobs Affidavit, J.A. 296-97. If an introductory phrase or certain portions of a tape reveal the tape to be a diary, the archivists will not review the tape further. *Id.* The archivists acknowledge, however, that at times they may find it necessary to undertake a word-by-word review of dictabelts that may, as a result of the review, be identified as diaries. *Id.* Presumably their judgment as to the necessary scope of review will be guided by the requirement to "take all reasonable steps to minimize the degree of intrusion into private or personal materials." 41 C.F.R. § 105-63.401-2(a) (1980).

Because this screening will be of the scope necessary to identification of the diaries, the description of the screening procedure requires some statement of what the archivists consider to be a private diary protected by the regulations and the Fourth Amendment. Whether a particular tape constitutes such a diary, of course, can be determined only on a case-by-case basis. Judicial consideration of challenges to particular characterizations, moreover, will clarify the criteria that determine whether given material is a private personal diary. But because the scope of archival screening will depend in part on what definition of diary the archivists employ, our explanation of the screening procedure requires us to consider at least

any general definition that the archivists will employ when screening the tapes.

The regulation governing archival screening of the dictabelts requires the archivists to segregate "private or personal" materials and transfer them to their owner. *Id.* § 105-63.401(a). "Private or personal" materials are defined as those "relating solely to a person's family or other nongovernmental activities, including private political associations, and having no connection with his constitutional or statutory powers or duties as President . . . ." *Id.* § 105-63.104(b).

We assume that the archivists, in acting under this definition, will heed the comments of the Government and Justice White at oral argument in *Nixon v. Administrator.* There the Government conceded, and Justice White emphasized, that material can constitute a private diary even if it contains matters of general historical significance. 433 U.S. at 488 & n.* (White, J., concurring). Reading the definition of "personal or private" in light of this insight, we assume, and were assured at oral argument by the intervenor-appellees, that the archivists will not act according to a definition that would deny diary classification to a purely personal tape simply because the tape recounts some events related to a President's official duties.

Materials subject to this initial screening procedure will be classified as personal or private diaries only if two archivists agree on that classification. Nixon Materials Archival Processing Manual, J.A. 161-62 & n.1; Brief of Appellee Administrator of General Services, at 27 n.7. If two are unable to agree, or feel that the classification raises significant questions of interpretation, they may refer the matter to the Senior Archival Panel, which may in turn refer it, if necessary, to the Presidential Materials Review Board. 41 C.F.R. § 105-63-401-2(d)-(e) (1980).

Mr. Nixon characterizes this screening procedure as a "word-by-word" review of all his diary materials. He is correct in the sense that the archivists' proposed method allows them the freedom to undertake such a review when they consider it necessary to identification of diary material. But each diary entry begins with a "triggering phrase," Mr. Nixon contends, and the archivists can identify his diary simply by listening for those phrases. Any single archivist's word-by-word review, therefore, violates his privacy rights guaranteed by the Fourth Amendment, a violation aggravated by the multiple screening that any final determination requires.

Before evaluating the archivists' proposed procedure, it is useful to understand how Mr. Nixon's claim here differs from his claim in *Nixon v. Administrator,* where the Court determined that archival screening of all the Presidential materials, which were acknowledged to contain diaries and other private materials, did not violate the same privacy interests on which he now relies. *Nixon v. Administrator* does not settle the issue in this case because the Court there considered only the Act's facial validity, and did not specifically hold valid this form of archival screening. But critical to the Court's decision was the fact that private and nonprivate materials were commingled, requiring archival review of all the materials to some degree. 433 U.S. at 463-65. Here Mr. Nixon claims that a particular identifying feature can separate certain types of private material from the rest of the materials, and that use of this feature represents the broadest screening procedure that is constitutionally permissible.

The Court's analysis in *Nixon v. Administrator* is, nonetheless, highly relevant to the claim Mr. Nixon now presses. Recognizing that some of the Presidential materials, such as diaries, fully implicate Mr. Nixon's

privacy rights, the Court judged the legality of archival screening according to its reasonableness. *Id.* at 460. Screening furthered the important congressional interest in preserving an "accurate and complete historical record." *Id.* at 452 n.14 (quoting 408 F. Supp. at 349). The resulting infringement on Mr. Nixon's privacy rights was reasonable, the Court found, in large part because the mingling of private and nonprivate materials made achievement of that congressional goal impossible without some screening of all the materials, and because the nonprivate nature of the bulk of materials minimized the intrusiveness of the screening. *Id.* at 465.

The reasonableness of the processing method now challenged by Mr. Nixon, it seems clear, largely depends on whether the method is necessary to identifying what is diary material and what is not. If reliance on trigger phrases alone can provide certain identification, then broader screening serves no legitimate interest and only intrudes further on Mr. Nixon's privacy rights. We stress the need for sure identification because we think the Act justifiably requires no less. Congress desired to preserve an accurate and complete historical record, and delegated to "trusted and disinterested" archivists, *id.* at 453, large responsibility for carrying out that goal. We cannot remove that responsibility from the archivists unless exclusive use of Mr. Nixon's trigger phrases presents no risks of unreliable or incomplete identification.

We are aware, of course, that we cannot uphold the District Court's grant of summary judgment against Mr. Nixon's diary claim if there is any genuine issue of material fact relevant to that claim. We can uphold the District Court only if, upon viewing the relevant evidence in the light most favorable to Mr. Nixon, we can conclude that the Administrator was entitled to judgment as a matter of

law. In addition, we bear in mind that decision by summary judgment is disfavored when additional development of facts might illuminate the issues of law requiring decision. 10 C. Wright & A. Miller, Federal Practice and Procedure § 2725, at 5401 (1973).

Mr. Nixon's own account of both his dictating procedure and the contents of the diary tapes requires us to conclude that the archivists' proposed procedure is not an unreasonable infringement of his privacy rights. Even the careful dictating procedure he describes cannot serve to identify diary materials with enough certainty to justify removing from the archivists their screening and identifying obligations under the Act. First, Mr. Nixon makes it clear that no single trigger phrase prefaces all diary entries. Rather, he varied the phrases over the course of time. More damaging to his claim that the trigger phrases provide certain identification, however, is his description of the feature that supposedly identifies the earlier diary materials. The archivists can recognize those dictations, he states, by the absence of the types of introductory phrases that marked his official, nondiary dictation. In other words, the archivists are to cease processing any dictation that does not begin with a phrase akin to "This is a memorandum to Bob Haldeman." We have no difficulty concluding that the absence of such a phrase gives no clear assurance that what follows is diary material. Without such an assurance, we cannot view as unreasonable the archivists' insistence upon not being restricted to that alleged identifying feature.

Mr. Nixon claims that his later diaries begin with less ambiguous identifying phrases, usually a statement that what followed was for the private file and was not to be transcribed. Presumably he would ask us to restrict the archivists to use of this phrase when it appears, even if they

cannot be restricted to use of the vaguer trigger phrase. But given Mr. Nixon's own account of the variations in his trigger phrases and of his failure, in general, methodically to follow any set system in keeping his diary, we cannot conclude that even the less ambiguous preface possesses sufficient reliability in the circumstances to relieve the archivists of their responsibilities under the Act.

V

As we recounted earlier, the District Court limited certain discovery efforts that Mr. Nixon attempted after he filed his motion for partial summary judgment in accordance with the schedule approved by the court. Mr. Nixon claims that these limitations represent an abuse of discretion because they prevented him from developing facts necessary to resolution of the issues now on appeal.

A district court has broad discretion over the scope of discovery. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2036, at 267-68 (1970). At the same time, however, a district court must not grant a motion for summary judgment if any genuine issue of material fact exists, and the court's broad power over discovery cannot excuse a grant of summary judgment in the face of such an issue of fact. Because our consideration of Mr. Nixon's claims has been guided by our duty to remand if any genuine issues of fact exist, much of our answer to this final claim is implicit in our determination that the District Court did not err in granting defendants' motions for partial summary judgment. A fuller description of Mr. Nixon's discovery efforts should make more clear our conclusion that the District Court acted within its discretion.

Mr. Nixon's allegations center on three orders of the District Court: (1) the November 2, 1977, protective order

postponing further discovery in connection with Mr. Nixon's first amended complaint, thereby preventing him from deposing the Archivist of the United States and the Administrator with respect to that complaint, J.A. 12; (2) the May 29, 1979, order denying Mr. Nixon's motion for leave to depose Robert Lipshutz, White House Counsel, J.A. 15; and (3) the June 25, 1979, order quashing the subpoenas served on Dr. James B. Rhoads, Archivist of the United States, and Richard A. Jacobs, Deputy Assistant Archivist, J.A. 16.

The first of these orders related to discovery in connection with Mr. Nixon's first amended complaint, which was superseded by a second and then a third amended complaint. The third amended complaint was filed to implement the February 14, 1979, settlement agreement, and the court granted summary judgment with respect to that complaint. The second and third order described above limited discovery relating to the third amended complaint.

To place these orders in perspective, it is helpful to note the timing of the discovery efforts they denied. The request underlying the first order occurred long before Mr. Nixon filed his final complaint. The second and third orders were in response to discovery efforts made by Mr. Nixon after he had filed his motion for partial summary judgment on his final complaint. In addition, the third order denied a request made after all parties had filed motions for partial summary judgment. All of these motions for partial summary judgment were filed in accordance with a schedule submitted by Mr. Nixon and agreed upon by the parties. The schedule called for "limited" discovery "reasonably necessary for the filing of dispositive motions," J.A. 190, a limitation underscored by the suggested period of only five days in which to res-

pond to discovery requests. *Id.* At the time Mr. Nixon moved for partial summary judgment, he had received responses to all the discovery requests that he had made since the settlement.

Mr. Nixon nonetheless asserts now that his discovery efforts sought facts whose absence in the record invalidates the court's decision by summary judgment. Upon inspecting his arguments and his "Offer of Proof" filed with the District Court, J.A. 389, we cannot agree. With respect to the first order, Mr. Nixon contends that the court should have allowed direct questioning of the Administrator as to his decisionmaking process, including whether political pressures shaped his decision to provide direct access to the tapes. We have already explained why the regulations' public access scheme comports with the Act and the Constitution, and we question the legal relevance of attempting to demonstrate that political factors played a part in the Administrator's decisionmaking process. *See* note 16 *supra*. Moreover, Mr. Nixon had and took the opportunity, after the settlement and the filing of the third amended complaint, to seek discovery from the Administrator, J.A. 201-07, and to those requests Mr. Nixon received responses, J.A. 212-23.

We are also unpersuaded that the District Court erred in rejecting Mr. Nixon's attempt to depose Robert Lipshutz, White House Counsel. Mr. Nixon's Offer of Proof states that this belated inquiry could have revealed that then-incumbent White House officials opposed the listening center concept, and that then-President Carter had not personally approved the listening center regulation. J.A. 390. But these or similar showings would not alter our conclusion that the Administrator devised a system for public access that does not violate the Constitution.

According to Mr. Nixon, his even later attempt to serve subpoenas on the Archivist and Deputy Assistant Ar-

chivist was necessary to contradict the affidavit of the Deputy Assistant Archivist, which the Administrator filed in support of his motion for partial summary judgment. Appellant's Brief, at 46. The portions of the affidavit contested by Mr. Nixon question the existence and reliability of trigger phrases in the diary tapes. We looked no further than Mr. Nixon's own affidavit, however, in concluding that the Administrator may constitutionally go beyond use of such phrases in appropriate cases. For the same reason, we may disregard Mr. Nixon's offer to discredit statements contained in the affidavit of Richard Ben-Veniste, J.A. 390, which the intervenor-defendants filed in support of their cross-motion for partial summary judgment, J.A. 339.

Finally, we cannot agree that the District Court should have allowed the subpoenas because they would have revealed mishandling by the National Archives of "many valuable items," J.A. 390, or agreement by the National Archives to a fifty-year restriction on the tape recordings of President Johnson, *id.* The constitutionality *vel non* of the public access regulation does not turn on the methods by which materials accumulated during prior Presidential terms were stored and made available to the public.

VI

After considering Mr. Nixon's constitutional objections to the regulations promulgated by the Administrator, we conclude that the District Court correctly held that defendants were entitled to judgment as a matter of law. Neither do we find any abuse of discretion by the District Court in denying Mr. Nixon's motions for further discovery. Accordingly, the judgment of the District Court is affirmed.

It is so ordered.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2453
Richard Nixon,
Appellant

v.

Rowland G. Freeman, III
as Administrator, General
Services Administration, et al.

September Term, 1981
Civil Action No. 77-1395
ARGUED: 1-22-81

BEFORE: Robinson, Chief Judge, McGowan, Senior Circuit Judge, Johnson*, Judge, United States District Court for the District of Columbia

ORDER

On consideration of appellant's petition for rehearing, filed March 11, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §292(a).

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RICHARD NIXON, Plaintiff	:	
v.	:	CIVIL ACTION NO. 77-1395
JOEL W. SOLOMON, Defendant	:	
and	:	FILED
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Intervenor-Defendants	:	Jul 23 1979 JAMES F. DAVEY, CLERK

ORDER

Upon consideration of Plaintiff's Motion for Partial Summary Judgment, and upon consideration of Defendant's Cross-Motion for Partial Summary Judgment, and upon consideration of Intervenor-Defendants' Cross-Motion for Partial Summary Judgment, and upon consideration of the Oppositions thereto and the entire record herein, and for the reasons presented and discussed in Defendant Solomon's Memorandum of Points and Authorities, it is by the Court this 23rd day of July, 1979,

ORDERED, that Plaintiff's Motion for Partial Summary Judgment is hereby DENIED; and it is

FURTHER ORDERED, that Defendant's and Intervenor-Defendants' Cross-Motions for Partial Summary Judgment are hereby GRANTED; and it is

FURTHER ORDERED, that Counts III and IV of the Plaintiff's Third Amended Complaint are hereby DISMISSED.

/ _____

Aubrey E. Robinson Jr
United States District
Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RICHARD NIXON, Plaintiff	:	
v.	:	CIVIL ACTION NO. 77-1395
JOEL W. SOLOMON, as Administrator of General Services Defendant	:	
and	:	FILED
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., Intervenor-Defendants	:	Oct 13 1979

ORDER

Upon consideration of Plaintiff's Motion for Reconsideration of this Court's July 23, 1979 Order and Plaintiff's renewed Motion for Partial Summary Judgment, and the respective oppositions of the Defendant and Intervenor-Defendants, and after a review of the entire record, it appearing to the Court that there was no breach of the parties' settlement agreement, it is by the Court this 12th day of October, 1979,

ORDERED, that Plaintiff's respective Motions for Reconsideration and Partial Summary Judgment be and hereby is DENIED; and it is

FURTHER ORDERED, that because there is no just reason for delay, the Order granting Defendants' Motion for Summary Judgment be and hereby is FINAL.

/ _____

Aubrey E. Robinson Jr.
United States District
Judge

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-1068

RICHARD NIXON,

Petitioner

v.

GERALD P. CARMEN, AS ADMINISTRATOR OF GENERAL SERVICES, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the Application of counsel for petitioner ( ),
IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 6, 1982

/s/Warren E. Burger

Chief Justice of the
United States

Dated this 16th
day of June, 1982

APPENDIX E

TITLE I—PRESERVATION OF PRESIDENTIAL RECORDINGS AND MATERIALS

DELIVERY AND RETENTION OF CERTAIN PRESIDENTIAL MATERIALS

Sec. 101. (a) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of Title 44, United States Code, any Federal employee in possession shall deliver, and the Administrator of General Services (hereinafter this title referred to as the 'Administrator') shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—

(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

(b)(1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memoranda, transcripts, and other objects and

materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.

(2) For purposes of this subsection, the term 'historical materials' has the meaning given it by section 2101 of title 44, United States Code.

AVAILABILITY OF CERTAIN PRESIDENTIAL MATERIALS

Sec. 102. (a) None of the tape recordings or other materials referred to in section 101 shall be destroyed, except as hereafter may be provided by law.

(b) Notwithstanding any other provision of this title, any other law, or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the tape recordings and other materials referred to in section 101 shall, immediately upon the date of enactment of this title, be made available, subject to any rights, defenses, or privileges which the Federal Government or any person may invoke, for use in any judicial proceeding or otherwise subject to court subpena or other legal process. Any request by the Office of Watergate Special Prosecution Force, whether by court subpena or other lawful process, for access to such recordings or materials shall at all times have priority over any other request for such recordings or materials.

(c) Richard M. Nixon, or any person whom he may designate in writing, shall at all times have access to the tape recordings and other materials referred to in section 101 for any purpose which is consistent with the provisions of this title, subsequent and subject to the regulations which the Administrator shall issue pursuant to section 103.

(d) Any agency or department in the executive branch of the Federal Government shall at all times have access to the tape recordings and other materials referred to in section 101 for lawful Government use, subject to the regulations which the Administrator shall issue pursuant to section 103.

REGULATIONS TO PROTECT CERTAIN TAPE RECORDINGS AND OTHER MATERIALS

Sec. 103. The Administrator shall issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials referred to in section 101 from loss or destruction, and to prevent access to such recordings and materials by unauthorized persons. Custody of such recordings and materials shall be maintained in Washington, District of Columbia, or its metropolitan area, except as may otherwise be necessary to carry out the provisions of this title.

REGULATIONS RELATING TO PUBLIC ACCESS

Sec. 104. (a) The Administrator shall, within ninety days after the date of enactment of this title [Dec. 19, 1974], submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:

(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate';

(2) the need to make such recordings and materials available for use in judicial proceedings;

(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings to information relating to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

(b)(1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report, unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.

(2) The Administrator may not issue any regulation or make any change in a regulation if such regulation or change is disapproved by either House of the Congress under this subsection.

(3) The provisions of this subsection shall apply to any change in the regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account the factors described in paragraph (1) through paragraph (7) of subsection (a), and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a).

(4) Paragraph (5) is enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(5)(A) Any resolution introduced under paragraph (1) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(B) If the committee to which any such resolution is referred has not reported any resolution relating to any regulation or change proposed by the Administrator under this section before the expiration of sixty calendar days after the submission of any such proposed regulation or change, it shall then be in order to move to discharge the committee from further consideration of such resolution.

(C) Such motion may be made only by a person favoring the resolution, and such motion shall be privileged. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(D) If the motion to discharge is agreed to or disagreed to, such motion may not be renewed.

(E) When the committee has reported, or has been discharged from further consideration of, a resolution introduced under paragraph (1), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of such resolution. Such motion shall be privileged. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(6) For purposes of this subsection, the term 'legislative days' does not include any calendar day on which both Houses of the Congress are not in session.

(c) The provisions of this title shall not apply, on and after the date upon which regulations proposed by the Administrator take effect under subsection (b), to any tape recordings or other materials given to Richard M. Nixon, or his heirs, pursuant to subsection (a)(7).

(d) The provisions of this title shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act, 5 U.S.C. § 552 et seq.

JUDICIAL REVIEW

Sec. 105. (a) The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

(b) If, under the procedures established by subsection (a), a judicial decision is rendered that a particular provision of this title, or a particular regulation issued under the authority granted by this title, is unconstitutional or otherwise invalid, such decision shall not affect in any way the validity or enforcement of any other provision of this title or any regulation issued under the authority granted by this title.

(c) If a final decision of such court holds that any provision of this title has deprived an individual of private property without just compensation, then there shall be paid out of the general fund of the Treasury of the United States such amount or amounts as may be adjudged just by that Court.

AUTHORIZATION OF APPROPRIATIONS

Sec. 106. There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

Section 105-63.404 Reproduction of tape recordings of Presidential conversations.

(a) To ensure the preservation of original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which;

(1) Involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government; and

(2) Were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Md.; Key Biscayne, Fla,; or San Clemente, Calif.; and

(3) Were recorded during the period beginning January 20, 1969, and ending August 9, 1974,

The Administrator will produce duplicate copies of such tape recordings in his custody for public and official reference use. The original tape recordings shall not be available for public access.

(b) Since the original tape recordings may contain information which is subject to restriction in accordance with § 105-63.402, the archivists shall review the tapes and delete restricted portions from copies for public and official reference use.

(c) Researchers may listen to reference copies of the tape recordings described in paragraph (a) of this section in the

National Archives Building in Washington, D.C. and at other reference locations established by the Administrator in accordance with § 105-63.403.

Section 105-63.104 Definitions.

For the purposes of this Part 105-63, the following terms have the meaning ascribed to them in this § 105-63.104.

. . .

(b) Private or personal materials. The term "private or personal materials" shall mean those papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other non-governmental activities, including private political associations, and having no connection with his constitutional or statutory powers or duties as President or as a member of the President's staff.

Section 105-63.401-2 Segregation and review; Senior Archival Panel; Presidential Materials Review Board.

(a) During the processing period described in § 105-63.401(a), the Administrator will assign archivists to segregate private or personal materials, as defined in § 105-63.104(b). The archivists shall have sole responsibility for the initial review and determination of private or personal materials. At all times when the archivists or other authorized officials have access to the materials in accordance with these regulations, they shall take all reasonable steps to minimize the degree of intrusion into private or personal materials. Except as provided in these regulations, the archivists or other authorized officials shall not disclose to any person private or personal or otherwise restricted information learned as a result of their activities under these regulations.

Office - Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-218

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD M. NIXON, PETITIONER

v.

GERALD P. CARMEN, ADMINISTRATOR OF GENERAL SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether former President Nixon's constitutional right of privacy or the Presidential privilege of confidentiality is violated by regulations, issued under the Presidential Recordings and Materials Preservation Act, which provide that the public may listen to non-personal portions of White House tape recordings made by Mr. Nixon of his conduct of official government business, when Mr. Nixon and other interested parties will have an opportunity to assert, and obtain judicial review of, a claim of privilege or invasion of privacy before any particular recording is made available.

2. Whether Mr. Nixon's constitutional right of privacy is violated by regulations that permit government archivists to listen to tape recordings to determine which are personal materials that must be returned to Mr. Nixon and which are Presidential historical materials subject to public release under the Act, when Mr. Nixon has not identified any reliable alternative method of segregating the private materials.

3. Whether the district court abused its discretion in ruling on Mr. Nixon's discovery requests, in view of an agreement among the parties limiting discovery.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 670 F.2d 346. The orders of the district court (Pet. App. 41a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1982. A petition for rehearing was denied on March 24, 1982 (Pet. App. 40a). On June 16, 1982, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including August 6, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was President of the United States from January 1969 until his resignation in August 1974. Shortly after petitioner's resignation, Congress enacted the Presidential Recordings and Materials Preservation Act (Pub. L. No. 93-526, Title I, 88 Stat. 1695 (codified at 44 U.S.C. 2107 note)). The Act was designed to preserve from possible destruction, and to make available for public access, petitioner's Presidential documents, including tape recordings of petitioner's office conversations (Section 101(a)). See generally *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 430-436 (1977).[1] The Administrator of General Services was directed to take possession of these materials, to have professional archivists screen the materials so that private and personal materials unrelated to "the abuses of governmental power popularly identified under the generic term 'Watergate'" and "not otherwise of general historical significance" could be returned to petitioner (Sections 104(a)(1), 104(a)(7)), and to promulgate regulations governing public access to the remaining materials (Section 101(b)(1)).

Petitioner immediately sued, challenging the constitutionality of the Act. In *Nixon* v. *Administrator of General Services, supra,* this Court, affirming the decision of a three-judge district court, upheld the Act on its face. The Administrator then issued regulations governing the preservation and protection of the materials and public access to them. Petitioner challenged these regulations on numerous grounds. [2]

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[1]This Court has estimated that the Act covered 42 million pages of documents and 880 tape recordings. *Nixon* v. *Administrator of General Services, supra,* 433 U.S. at 430.

[2]Petitioner's complaint listed 11 causes of action in 21 paragraphs. C.A. App. 21-28. ("C.A. App." refers to the joint appendix filed in the court of appeals.)

After negotiations, the parties entered a settlement agreement (C.A. App. 92-182) that required the Administrator to issue revised regulations. In return, petitioner filed an amended complaint in which he dropped all but two of his claims (Pet. App. 5a-6a). First, petitioner challenged the regulations insofar as they provided that those recordings made available for public access could be listened to by members of the public; petitioner contended that public access should be deferred, or that only transcripts or summaries should be released to the public. Second, petitioner asserted that strict limitations should be imposed on the extent to which the government archivists responsible for segregating public from private materials could listen to each tape recording; specifically, petitioner contended that the private recordings "are clearly and easily identifiable as [petitioner's] personal diary by reason, *inter alia,* of the introductory words" (C.A. App. 185).

Petitioner filed a motion for summary judgment on this complaint, and the government then filed a cross-motion for summary judgment. The United States District Court for the District of Columbia granted the government's motion (Pet. App. 6a-7a). The court of appeals affirmed, in an opinion by Judge McGowan, the author of the district court opinion in *Nixon* v. *Administrator of General Services,* 408 F. Supp. 321 (D.D.C. 1976), aff'd, 433 U.S. 425 (1977). The court of appeals rejected petitioner's contentions on the two claims remaining after the settlement agreement, and rejected as well petitioner's contention that the district court erred in not allowing certain discovery.

ARGUMENT

1. Petitioner challenges (Pet. 9-14) the way in which the public will be allowed access to tape recordings. But under the Act and its implementing regulations, no materials will be made public until they are reviewed by archivists and determined not to fall into certain categories; petitioner will then have an opportunity to challenge, in court if necessary, the archivists' determination. Specifically, the archivists, in reviewing the materials, are to give priority to segregating "private or personal materials" and returning them to their owner. They then must segregate materials that do not relate to "abuses of governmental power" or are not otherwise of "general historical significance"; even materials relating to abuses of power, or having general historical significance, will not be made public if their release would constitute "a clearly unwarranted invasion of personal privacy" (Pet. App. 9a-10a & n.10).[3] At least 30 days before releasing any materials, the Administrator must both publish and send to petitioner a notice identifying the materials to be released. Petitioner or any other person claiming a constitutional or legal right that would limit public access to the materials the Administrator proposes to release may file a claim with the Administrator, and if administrative proceedings do not resolve that claim, the Act provides for expedited judicial review in the United States District Court for the District of Columbia. *Id.* at 11a-13a.

Materials that are finally made public are to be made available in the form of duplicate tape recordings to which members of the public may listen. Petitioner urges that by not "[d]eferring direct public access for a period, such as the life of the participants in the conversations, or substituting

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[3]The one exception to this restriction is that materials "essential to an understanding of abuses of governmental power" are to be made available to the public. Pet. App. 10a n.10.

written synopses or even transcripts for the recordings themselves" (Pet. 13), the regulations violate both the constitutional privilege for Presidential communications and petitioner's personal privacy rights (Pet. 9-14).

a. Petitioner fails to explain why his ability to challenge the release of any particular recording does not adequately protect against the possibility that public listening will violate the Presidential privilege. If the release of a recording for public listening will violate the privilege, the release will be barred. Moreover, before asserting his claims in court, petitioner can attempt to persuade the Administrator and other responsible officials to delay the release of particular recordings or to release only summaries or transcripts; these officials, members of the executive branch, can be expected to be "sensitive to executive concerns" (*Nixon* v. *Administrator of General Services, supra,* 433 U.S. at 451) and to share the executive's "vital[] concern[] with * * * the privilege" (*id.* at 449).

Petitioner's claim appears to be that allowing members of the public to listen to *any* of the recordings violates the Presidential privilege because the other means of access he proposes "advance[] the Act's legitimate objectives without unduly encroaching upon the rights of the conversants" (Pet. 13). But as the court of appeals noted, it is abundantly clear that allowing members of the public to listen to the recordings is a superior way of informing them (Pet. App. 22a-23a):

> We need not draw on disputed empirical evidence to conclude that reading transcripts or synopses, no matter how conscientiously or expertly made, is less effective a form of public access than listening to the tapes themselves. To name but a few of the differences between the spoken and written word, phrases may be inaudible or indiscernible, inflections may vary the

> meaning of a particular word or phrase, and silences or pauses may form part of a conversation's content. Even Mr. Nixon's counsel, who by his own account has listened to many of the Presidential tapes, has stated that many portions of the tapes are of poor quality and are often unintelligible. * * * If a statement is inaudible or ambiguous, the ability to listen and form one's own conclusion rather than rely on another's rendition furthers the congressional goal of providing the public with full information about the Nixon Presidency.

At the same time, there is little basis for petitioner's argument that the release of materials in this form will infringe the privilege more than their release in the form of synopses or summaries. The purpose of the privilege is to encourage candid internal deliberations; "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process" (*United States* v. *Nixon*, 418 U.S. 683, 705 (1974)). As the court of appeals noted (Pet. App. 23a), it is unlikely that officials who are concerned about possible public disclosure of their recorded remarks will be moved to be more candid by the assurance that only a transcript of their remarks could ever be made public.

Petitioner also suggests that the release of the materials should be delayed "for a period, such as the life of the participants in the conversations" (Pet. 13). While it may be appropriate to delay the release of some materials, the time at which particular tapes will be released remains to be determined. As the court of appeals pointed out (Pet. App. 24a), an across-the-board delay would seriously conflict with the Act's purpose of informing the public. Many of the subjects covered by the recordings are undoubtedly of current interest, and once a recording has been determined not

to be privileged, the public interest in not waiting several decades before learning its contents is obviously substantial.

In contrast, the benefit of an across-the-board delay of the release of the tapes — that is, the extent to which such a delay will encourage greater candor among high-level officials in the future — would not be great. The only recordings released without further delay will be those that the archivists determine to release, that are not subject to a successful assertion of privilege, and that contain conversations occurring in 1974 or earlier. Especially in view of this Court's observation that "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding. * * * The expectation of the confidentiality of executive communications * * * has always been limited and subject to erosion over time after an administration leaves office" (*Nixon* v. *Administrator of General Services, supra,* 433 U.S. at 450-451), the release of those materials is not likely to chill internal debate. The court of appeals was therefore justified in concluding that the costs to the Act's objectives are not outweighed by the benefits of the blanket delay petitioner proposes.

b. In *Nixon* v. *Administrator of General Services, supra,* the Court held that while petitioner has a privacy interest, protected by the Constitution, in his "personal communications," he has no personal privacy interest in "the overwhelming majority of the materials" (433 U.S. at 465), because those materials "pertain, not to [petitioner's] private communications, but to the official conduct of his Presidency" (*id.* at 459). The Administrator's regulations—which reflect this Court's definition of petitioner's

privacy rights[4] — require the segregation of the private materials, and petitioner may challenge in court any proposal to release materials he considers private. There is, accordingly, no basis for assuming that any of the materials that implicate petitioner's personal privacy rights will be released at all.

Petitioner does not assert that there is reason to believe that personal materials will be disclosed; instead, he challenges (Pet. 10-13) the conclusion — settled by *Nixon* v. *Administrator of General Services* — that his constitutional privacy interest is limited to "matters of personal life unrelated to any acts done * * * in [his] public capacity" (433 U.S. at 457, citing *Whalen* v. *Roe*, 429 U.S. 589 (1977)). Petitioner appears to be collaterally estopped from relitigating this issue of law; moreover, apart from assertions about the practices of other Presidents, petitioner suggests no reason for the Court to reexamine this holding. Petitioner concedes that his assertions about other Presidents' practices are not supported by the record (Pet. 11 n.4), and in any event the definition of petitioner's privacy rights that this Court adopted in *Nixon* v. *Administrator of General Services* was based in large part on its review of the practices of other Presidents. See 433 U.S. at 457-458. As Judge McGowan explained in his opinion for the court of appeals,[3] petitioner "could have had [a legitimate] expectation [of privacy] in some materials, such as diaries or other

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[4]See 41 C.F.R. 105-63.104(b) ("The term 'private or personal materials' shall mean * * * materials in any physical form relating solely to a person's family or other non-governmental activities, including private political associations, and having no connection with his constitutional or statutory powers or duties as President or as a member of the President's staff.").

[3]Judge McGowan's opinion for the district court in *Nixon* v. *Administrator of General Services*, *supra*, was the foundation of this Court's discussion of the relationship between other Presidents' practices and petitioner's privacy interests. See 433 U.S. at 457-458 n.19.

communications respecting personal matters unrelated to his public duties, * * * but not in materials relating to the conduct and official duties of the Presidency * * *. Such materials are deemed nonprivate precisely because of the public's traditional interest in and eventual access to them, as well as a President's voluntary assumption of his role as public leader." Pet. App. 15a-17a.

2. Petitioner asserts (Pet. 15) that although "less intrusive" means are available, the archivists propose to undertake "word-by-word review" of the recordings in order to determine which of them are private and therefore must be returned to petitioner. In an affidavit (C.A. App. 226-228), petitioner stated that he frequently recorded a personal diary on either dictabelts or cassette tapes, and that the diary entries, unlike other dictation, typically did not begin with a statement such as " 'This is a memorandum for Bob Haldeman' "; instead, they were "addressed to no one" and "[s]ometimes * * * began with a statement of the date followed by the beginning of a recitation of events" (C.A. App. 227-228). Petitioner also stated (C.A. App. 228): "As I continued to make these diaries, I began with greater regularity to preface them with opening comments designating them as private."

In the courts below, petitioner claimed that the archivists could determine whether his recordings were private without listening beyond the point at which a "triggering phrase," indicating that a recording was part of his diary, occurred, and that the archivists' authority to review the recordings should, accordingly, be strictly circumscribed (Pet. App. 33a). The court of appeals ruled that in view of petitioner's "own account of the variations in his trigger phrases and of his failure, in general, methodically to follow any set system in keeping his diary" (*id.* at 36a), the archivists could not be so limited. The court instead endorsed the Administrator's approach (*id.* at 31a):

> The archivists essentially propose to review the dictabelts and other tapes in the detail necessary to ascertain whether the dictabelt or tape constitutes a personal diary. * * * If an introductory phrase or certain portions of a tape reveal the tape to be a diary, the archivists will not review the tape further. * * * The archivists acknowledge, however, that at times they may find it necessary to undertake a word-by-word review of dictabelts that may, as a result of the review, be identified as diaries. * * * [T]heir judgment as to the necessary scope of review will be guided by the requirement [of the regulations] to "take all reasonable steps to minimize the degree of intrusion into private or personal materials."

The court of appeals was plainly correct in concluding that petitioner's affidavit simply did not establish that there was any set of "trigger phrases" that identified petitioner's diary with reasonable certainty. Petitioner's affidavit does not assert, for example, that all his dictation except his diary was addressed to someone. Moreover, petitioner acknowledged that his practice was irregular. It follows that in some instances at least, the archivists must listen past the introductory phrase in order to determine whether a recording is part of petitioner's personal diary. As the court of appeals pointed out, however, when it can be ascertained that a tape is private without listening to the entire tape the archivists will listen no further than is necessary to make that determination.

Petitioner now appears to have abandoned his insistence on "the 'triggering phrase' method" (Pet. 15). Instead, petitioner proposes that the archivists be required to "use * * * the 'triggering method' whenever it fulfills the task, with access to such portions of the dictation as are necessary to determine its character only when the 'triggering phrase'

method is actually inadequate" (*ibid.*). This approach is indistinguishable from that specified by the Administrator and upheld by the court of appeals.

3. Finally, petitioner claims that the district court abused its discretion in not allowing him to depose the Counsel to the President and the Archivist and Deputy Assistant Archivist of the United States. Petitioner intended to question the Counsel about his and the President's views on the Administrator's regulations, and to question the Archivist and Deputy Assistant Archivist on their agreements with other Presidents about the disposition of their materials.

As the court of appeals explained (Pet. App. 37a), when petitioner filed his complaint after the settlement agreement was reached, he also proposed a schedule. The schedule provided for "a brief period for discovery of material 'reasonably necessary for of filing dispositive motions' " (Pet. App. 6a). The district court accepted the schedule, and interrogatories and requests for admissions were served upon, and answered by, the Administrator (*ibid.*). Petitioner then moved for summary judgment. Shortly *after* filing this motion, petitioner sought leave to depose the Counsel to the President. Later, after the government had filed its cross-motion for summary judgment, petitioner sought to take the depositions of the Archivist and Deputy Archivist and subpoenaed documents from them.

In these circumstances, the district court plainly did not abuse its discretion in denying discovery. Petitioner asserts (Pet. 9) that he sought to depose the Archivist and the Deputy Assistant Archivist because the government had introduced affidavits from them; but the court of appeals expressly eschewed reliance on their affidavits (Pet. App. 38a-39a). Moreover, petitioner does not explain why the supposed relevance of other Presidents' agreements with the Archivist did not become clear to him until after the

summary judgment motions had been filed. Finally, even apart from the discovery schedule, petitioner's claim that he was entitled to depose the Counsel to the President to determine his and the President's views about the regulations is obviously insubstantial; the regulations were issued by the Administrator of General Services, who is a member of the executive branch, and are defended by the Department of Justice, which is responsible for representing the executive branch in court. See *Nixon* v. *Administrator of General Services, supra,* 433 U.S. at 441, 449.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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NOVEMBER 1982

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[6]Indeed, the deliberative privileges of the executive branch, which petitioner not only recognizes but advocates, protect the content of exchanges between the President and one of his closest legal advisers in litigation against the government.

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No. 82-218

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD NIXON,

Petitioner,

v.

GERALD P. CARMEN, Administrator, General Services Administration, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTIONS PRESENTED

Whether some constitutionally protected privacy interest of former President Richard Nixon prohibits the Administrator of General Services from allowing researchers to listen to White House tape recordings of nonpersonal, nonprivileged conversations relating to governmental matters.

Whether recorded materials that are claimed by Mr. Nixon to be personal diaries must be treated as inherently private or personal and therefore surrendered to him without being reviewed by archivists in the detail necessary to determine whether they in fact constitute such diaries.

Whether the district court abused its discretion in denying certain of Mr. Nixon's requests for discovery.*

*Parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit were Richard Nixon, Plaintiff-Appellant; Rowland G. Freeman, III, as Administrator of General Services, Defendant-Appellee; and The Reporters Committee for Freedom of the Press, American Historical Association, American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald G. Herzberg, William Leuchtenburg, Arthur Link, J. Anthony Lukas, Austin Ranney, and Clement E. Vose, Defendants-Appellees. Dr. Herzberg is now deceased.

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BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, The Reporters Committee for Freedom of the Press, American Historical Association, American Political Science Association, *et al.*, respectfully request that the petition for a writ of certiorari be denied.

STATUTES AND REGULATIONS INVOLVED

The Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (note) (1976), and Sections 105-63.104(b), 105-63.401-2(a), and 105-63.404 of Title

41, Code of Federal Regulations, are reproduced in Appendix E to the Petition. (Pet. App. E. 45a-53a.) Sections 105-63.104(a), 105-63.401, 105-63.401-1, 105-63.401-2, 105-63.401-3, 105-63.402-1, 105-63.402-2, and 105-63.405 of Title 41, Code of Federal Regulations, are reproduced in Appendix 1, *infra* (2a-13a.)[1]

STATEMENT OF THE CASE

Former President Richard Nixon initiated this action on August 10, 1977, to challenge certain regulations promulgated by the Administrator of General Services ("the Administrator") pursuant to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (note) (1976). Mr. Nixon's original complaint attacked the validity of various regulations pertaining to the processing of, and government access to, historical materials of the Nixon Administration in the Administrator's custody.[2] In December 1977, regulations governing *public* access to the materials became effective, and on January 31, 1978, Mr. Nixon amended his complaint to challenge those regulations as well. The amended complaint, which contained nineteen counts, attacked the public access regulations in many respects.

On June 9, 1978, the district court granted the motion of The Reporters Committee for Freedom of the Press, *et al.*, to intervene as defendants. Thereafter, the parties engaged in extensive negotiations in an attempt to resolve as many issues as possible. By an agreement dated

[1]The appendices to this Opposition to the Petition shall be cited as "Opp. App. [page(s)]."

[2]Mr. Nixon filed a First Amended Complaint on August 19, 1977 to include a challenge to certain revisions made to the government access regulations.

February 14, 1979, the parties settled all but two of the claims raised by Mr. Nixon's amended complaint. (The settlement agreement is set forth as Appendix 2 hereto, Opp. App. 14a-17a.) The agreement provided that the Administrator would submit to Congress various modifications of the regulations. This was done, and the amended regulations became final. They are codified at 41 C.F.R. Part 105-63.

The regulations establish procedures by which the materials of the Nixon Administration will be reviewed and screened by archivists and thereafter selectively made available to the public. As revised pursuant to the settlement agreement, the regulations contain many provisions that protect both Mr. Nixon's right of privacy in personal materials and his right to assert executive privilege with respect to governmental matters. The regulations require, for example, that all personal materials among the items in the Administrator's custody be returned to Mr. Nixon as soon as they have been identified and segregated, and mandate that archivists or other authorized officials shall not disclose any private or personal information learned in the course of their screening activities. 41 C.F.R. §§ 105-63.401-2, .401-3. The archival screening process established by the regulations is similarly designed to prevent any public disclosure of any of Mr. Nixon's family matters, personal financial information, or other aspects of his personal life. *Id.* §§ 105.63.104(b), .401(a), .402-1, .402-2.

At least thirty days before opening each segment of materials to public access, the Administrator must publish notice of the proposed release in the Federal Register and send a copy of the notice to, *inter alia,* Mr. Nixon or his designated agent. *Id.* § 105-63.401(b). If Mr. Nixon claims that any of the materials are personal, he may notify the

Administrator of his claim and have the matter considered and determined by a five-member Presidential Materials Review Board. *Id.* §§ 105-63.401-1(d), .401-2(f). With regard to the confidentiality of governmental matters, the regulations preserve Mr. Nixon's right to assert claims of executive privilege as to any materials that he believes fall within the scope of the privilege and require confidentiality. *Id.* at § 105-63.401-1(a).

As indicated, the settlement agreement among the parties left only two issues unresolved. The first is whether researchers may listen to reference copies of the nonpersonal, nonprivileged portions of tape recordings made in the Oval Office and elsewhere during the Nixon Administration, at archival centers in various cities. Opp. App. 14a. The second concerns the manner in which certain tape recordings, alleged by Mr. Nixon to contain his personal diary, shall be screened by archivists for the purpose of determining whether such recordings do, in fact, constitute a diary. *Id.*

In March 1979, Mr. Nixon filed a Third Amended Complaint raising these two remaining issues. At the same time, Mr. Nixon proposed a schedule to the district court for disposition of his claims. He recognized that the issues were appropriate for resolution by summary judgment and therefore proposed that he would file a motion for summary judgment approximately one month after receiving responses to, in his words, "narrowly limited" discovery requests. (Mr. Nixon's proposal is reproduced in Appendix 3 hereto. Opp. App. 18a-20a.) The district court accepted Mr. Nixon's proposal.[3]

[3]The schedule that Mr. Nixon proposed contemplated discovery requests so limited that only *five days* would be allowed for responding, in contrast to the thirty days ordinarily permitted by the Federal Rules of Civil Procedure. *See* Opp. App. 18a-19a.

(Footnote continued on next page)

Pursuant to his schedule, Mr. Nixon served a set of interrogatories, a request for production of documents, and a request for admissions on the Administrator. After receiving responses to the request for admissions, Mr. Nixon served a supplemental set of interrogatories. After the Administrator had responded to all of these discovery requests, Mr. Nixon moved for summary judgment.

Four days *after* he filed his summary judgment motion, Mr. Nixon sought leave to serve a subpoena *duces tecum* on Robert Lipshutz, then White House Counsel, to discover whether personnel in the White House had considered any "alternatives" to making the Nixon tapes available for public listening. The Administrator opposed this effort on the grounds that the requested materials were irrelevant to the validity of the tapes-access regulation, that the request would unnecessarily delay the proceedings, and that some of the documents would be privileged. The district court agreed and denied Mr. Nixon's request.

Shortly thereafter, the Administrator and the intervenor-defendants cross-moved for summary judgment. Mr. Nixon then noticed the depositions of the Ar-

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(Footnote continued from previous page)

Mr. Nixon suggests in his Petition that he was forced to serve limited discovery requests because the district court had previously entered an order staying all discovery. Pet. 5. This is highly misleading. As the court of appeals observed, the stay order that Mr. Nixon cites had been entered in November 1977 with respect to Mr. Nixon's original complaint challenging the so-called government-access regulations, and not with regard to the public-access issues raised by the second and third amended complaints. *See* Pet. App. 36a-37a. The district court placed no prior restrictions on Mr. Nixon's discovery in 1979 on the public-access issues. Indeed, when Mr. Nixon proposed his expedited schedule for discovery and briefing in March 1979, he did not even refer to the 1977 order and did not contend that it restricted his discovery plans in any way. *See* Opp. App. 18a-20a.

chivist of the United States and a Deputy Assistant Archivist, and subpoenaed from those individuals documents concerning the extent to which tape recordings involving Presidents Kennedy and Johnson had been made available to the public. The Administrator moved to quash the subpoenas on the ground that the availability or nonavailability of materials of prior Presidents was irrelevant to the validity of regulations under the Presidential Recordings and Materials Preservation Act. The Administrator also sought a protective order prohibiting further discovery until the pending motions for summary judgment were decided. The district court granted the Administrator's motion and subsequently granted summary judgment in favor of the Administrator and intervenor-defendants. Pet. App. 41a-43a.

The court of appeals affirmed in an opinion by Judge McGowan. Pet. App. 1a-39a. The court held that because the regulations specifically require that private or personal material be identified and returned to Mr. Nixon, and provide procedures for asserting constitutionally based objections to any public access, the provision allowing researchers to listen to reference copies of tapes does not implicate Mr. Nixon's privacy rights (including his rights of associational privacy protected by the First Amendment). *Id.* 15a-17a.

For the same reasons, the court of appeals held that the tapes-access provision does not unduly infringe upon the presidential privilege of confidentiality. Pet. App. 18a-28a. The court noted that the regulations permit Mr. Nixon to assert claims of privilege as to any conversations as to which he believes there is an ongoing need for confidentiality. The court also took account of the fact that the incumbent President, who "is best situated to judge when disclosure will adversely affect his receipt of candid

advice and discussion" (*id.* 20a), had not raised any challenge to the tapes-access provisions, and emphasized that the presidential privilege of confidentiality had eroded in the time – now more than nine years – since the last tape was produced.

The court of appeals also upheld the archivists' review of Mr. Nixon's dictabelts in the detail necessary to ascertain whether they constitute a personal diary to be returned to Mr. Nixon. Pet. App. 28a-36a. Based on Mr. Nixon's own admissions in his affidavit, the court rejected Mr. Nixon's suggestion that certain "trigger phrases" on the dictabelts were alone sufficient to identify them as diaries. *Id.* 34a-36a. Accordingly, the court refused to prohibit the archivists from undertaking an appropriate review – including, if necessary, a word-by-word review – of dictabelts that may, as a result of the review, be identified as diaries.

Finally, the court of appeals held that the district court did not abuse its discretion in limiting certain of Mr. Nixon's discovery efforts. The court noted that those discovery efforts were untimely under the schedule that Mr. Nixon himself had proposed, and that, in any event, the information that he had belatedly sought was irrelevant to the issues presented. Pet. App. 36a-39a.

REASONS FOR DENYING THE WRIT

I. THE CONSTITUTION DOES NOT BAR THE PUBLIC FROM LISTENING TO NONPERSONAL, NONPRIVILEGED PORTIONS OF THE WHITE HOUSE TAPES THAT RELATE TO GOVERNMENTAL MATTERS

The issue now before this Court with respect to public access to the White House tapes is extremely narrow. Mr. Nixon does not challenge the Administrator's right and duty under the Presidential Recordings and Materials Preservation Act to release the substance of the nonpersonal, ~~nonpublic~~ nonprivileged portions of the White House tapes in some form at some point in time. The issue, in Mr. Nixon's words, is simply "the *time, place* and *manner* in which the substance of the presidential tape recordings will be made available to the public." (Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment, May 4, 1979, at 1, emphasis added.) Mr. Nixon claims that he has a personal privacy interest in taped conversations relating to governmental matters, and he argues that this interest should have been accommodated by delaying access to the tapes for a period of years and/or by releasing transcripts or synopses in lieu of permitting the public to listen to the tapes.

In order to place the tapes-access issue in perspective, it is important to recognize what is *not* legitimately in dispute in this case:

First, the issue is not whether Mr. Nixon's personal conversations with family members and others will be released to the public. The regulations permit researchers to listen only to those portions of taped conversations pertaining to governmental matters and do *not* allow researchers to listen to personal conversations. Before any tapes are

made available to researchers, they will be carefully reviewed pursuant to an archival screening process designed to prevent disclosure of personal matters. And, as noted above, the regulations provide a procedure for Mr. Nixon to challenge proposed public access to any materials that he claims are private or personal. 41 C.F.R. §§ 105-63.401, .401-1, .401-2, .401-3.

Second, the issue is not whether any particular tapes should be withheld from the public on the basis of executive privilege. Again, the regulations provide a procedure for Mr. Nixon to challenge proposed public access to any materials that he believes should be withheld on that basis. *Id.* §§ 105-63.401(b), .401-1. Although Mr. Nixon seeks to raise certain privilege arguments in his Petition, there is no merit to his across-the-board, undifferentiated claims (see pp. 12-13, *infra*).

Third, this case does not involve the question whether the public should be entitled to obtain recorded copies of presidential conversations. The regulations do not authorize reproduction of the tapes. *Id.* § 105-63.405. Consequently, this case does not present the issues of public availability that were before this Court in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).[4]

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[4]Certain other issues that Mr. Nixon seeks to raise in footnotes and elsewhere in his Petition are not properly before the Court at this time. On page 7 and footnote 3 of the Petition, Mr. Nixon suggests that the regulations are defective in that they give inadequate protection to private, political materials pertaining to partisan politics. Mr. Nixon made this claim in his Second Amended Complaint (Count 7, ¶ 21), filed in January 1978, where he alleged that the Administrator's definition of Presidential historical materials unlawfully included materials "made or received by Mr. Nixon or his staff in connection with, *inter alia*, his political activities. . ." This issue, however, was disposed of by the February 1979 settlement agreement and was not litigated in the courts below.

In challenging the regulations providing for ultimate public access to some of the non-personal tapes, Mr. Nixon thus seeks to ignore the broad protections accorded to him by the regulations and urges the Court to create an unprecedented, unnecessary, new constitutional right. He urges this Court to rule that, in addition to personal privacy rights in personal materials and governmental privacy rights in governmental materials (*i.e.*, executive privilege), public officials should also have a constitutionally protected *personal* right of privacy in *governmental* materials.

Mr. Nixon does not explain in his Petition, and did not explain in the courts below, how this new constitutional "right" differs from executive privilege or why it is necessary. He argues that a President should be permitted to discuss potential legislation, the condition of national affairs, and so forth in private (Pet. 11), but this is precisely why the doctrine of executive privilege was developed.

The proposition that public officials should have a personal privacy right in governmental deliberations, over and above the protections granted by executive privilege, would have far-reaching consequences. For example, if a public official were subpoenaed by a congressional committee or court to give testimony concerning closed-door conversations involving use of government power, the official would be permitted to invoke this new constitutional right of personal "privacy" to impede the inquiry.

The court of appeals' rejection of Mr. Nixon's argument is consistent with this Court's decision in *Nixon v. Administrator*, 433 U.S. 425 (1977). That case, which upheld the facial validity of the Presidential Recordings and Materials Preservation Act, held that Mr. Nixon does not have a constitutionally protected, personal privacy interest

in governmental matters. In holding that archival screening of all of Mr. Nixon's presidential materials would not unconstitutionally invade his right of privacy, this Court stressed that Mr. Nixon has a privacy interest in only "a very small fraction" of the materials of his Presidency – and not in the "overwhelming bulk" of his papers and tapes pertaining to "the official conduct of his Presidency." *Id.* at 459. In discussing Mr. Nixon's right of privacy, the Court repeatedly referred to his "private materials," "personal matters," "private information" and "private communications between him and, among others, his wife, his daughters, his physician, lawyer, clergyman, and his close friends" – as distinguished from materials relating to "the official conduct of his Presidency," matters concerning "any acts done by [him] in [his] public capacity," and tape recordings pertaining to "the conduct and business of the Presidency." *Id.* at 456, 457, 459. The "overwhelming majority" of Mr. Nixon's papers and tapes, this Court said, fall into the latter categories, and in light of his "status as a public figure," Mr. Nixon "lack[s] . . . any expectation of privacy" in such materials. *Id.* at 465. *See generally New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) (individuals who have elected to place themselves in the public spotlight surrender certain privacy protections).[5]

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[5]The Petition asserts that the court of appeals defined Mr. Nixon's right of privacy according to the *content* of what was expressed in a taped conversation – that is, according to whether the content consisted of nongovernmental, personal topics. Pet. 10. In fact, the court of appeals, like this Court in *Nixon* v. *Administrator,* defined Mr. Nixon's right of privacy according to the reasonableness of his expectation of privacy. Pet. App. 15a-16a. In doing so, the court of appeals followed, and did not deviate from, the cases Mr. Nixon cites for the proposition that Fourth Amendment privacy protection derives from one's legitimate expectation of privacy. *See* cases cited at Pet. 10.

Mr. Nixon also suggests that the regulation permitting researchers to listen to reference copies of the tapes infringes upon the presidential privilege of confidentiality, in addition to his personal privacy rights. As the court of appeals emphasized, however, the regulations fully protect any remaining presidential privilege. Pet. App. 19a-21a. Before any materials are opened to the public, the regulations require that both the incumbent President and Mr. Nixon be notified. 41 C.F.R. § 105-63.401(b). If either the incumbent President or Mr. Nixon believes that disclosure would violate the privilege, he may object administratively and may obtain judicial review of any adverse determination. *Id.* § 105-63.401-1(a). *See* Presidential Recordings and Materials Preservation Act § 105(a), 44 U.S.C. § 2107 (note) (1976).

Mr. Nixon claims that the regulations provide inadequate protection because they do not require the archivists to withhold materials on grounds of executive privilege but instead require *him* or his representatives to assert privilege as to particular conversations. Pet. 14 n. 6. This contention is not properly before the Court,[6] and, in any event, is without merit. As the court of appeals indicated, the very nature of the privilege necessitates that claims be asserted on a disclosure-by-disclosure basis by Mr. Nixon or by the incumbent President. This is because the question whether particular material implicates the privilege "depends on whether disclosure will affect the flow of ex-

[6]This issue was explicitly raised by Mr. Nixon's Second Amended Complaint, filed in January 1978, in which he alleged that the regulations were unconstitutional in that they "do not contain any provision exempting from disclosure materials embodying, reflecting or constituting communications subject to the presidential privilege of confidentiality. . . ." (Count 6, ¶ 20). This issue was settled by the parties in February 1979 and, therefore, was not included in the Third Amended Complaint.

ecutive discussion," which involves complex judgments that cannot be made in the abstract by archivists. Pet. App. 27a, citing *Nixon v. Administrator,* 433 U.S. at 449. This is particularly true in the case of the presidential materials at issue in this case since none of them will be available for disclosure until at least a decade after they were produced. *See* Pet. App. 20a. The court of appeals also observed that the incumbent President did not challenge the regulations (*id.* 20a), and, as this Court observed in *Nixon v. Administrator,* 433 U.S. at 449, "it must be presumed that the incumbent President is . . . in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly."[7]

[7]The Petition contends that, because of the district court's limitations on discovery, President Carter's position concerning the tapes-access regulation was never revealed. Pet. 13. It was not necessary, however, to depose the White House Counsel or to review White House documents to discern the position of the Executive Branch. In *Nixon* v. *Administrator,* 433 U.S. at 441, this Court properly inferred President Carter's support for the Presidential Recordings and Materials Preservation Act from the positions of "the Administrator of General Services, . . . an official of the Executive Branch, appointed by the President," and of the Solicitor General. This Court did not require sworn testimony from President Carter or his counsel to discern his position. President Carter's Administrator of General Services promulgated and administered the regulations here at issue and the Department of Justice defended them vigorously in the courts below. Just as the actions of the Administrator and the Department of Justice were attributed to the incumbent President in *Nixon* v. *Administrator,* so must they be here.

In any event, the regulations were promulgated by the executive branch official charged with responsibility for doing so, and they stand on their own. It is improper and irrelevant to engage in detailed discovery concerning the persons who reviewed the regulations prior to their issuance. *See United States* v. *Morgan,* 313 U.S. 409, 422 (1941).

Finally, Mr. Nixon argues that the Administrator was required to select a means of public access to the tapes "less restrictive" than public listening. Pet. 9, 12-13. The form of access the Administrator chose, Mr. Nixon asserts, "constitutes the most significant intrusion upon the rights of the former President and others." Pet. 12. That form of access, however, must be viewed as the court of appeals viewed it – in the context of the complete regulatory scheme. *See* Pet. App. 24a-25a. That scheme provides significant protection for the rights of Mr. Nixon and others in the obligation of archivists to restrict materials pertaining to private or personal matters, and in the opportunity of individuals to assert a right of privacy, or any other legal or constitutional right, in challenging particular disclosures.

Allowing researchers to listen to the nonpersonal, nonprivileged portions of the tapes is, as the court of appeals held, a reasonable means of achieving the purposes of the Presidential Recordings and Materials Preservation Act. *See* Pet. App. 21a-22a. Those purposes include preserving "an accurate and complete historical record" of Mr. Nixon's presidency and "facilitating a full airing of the events leading to [his] resignation." *Nixon v. Administrator*, 433 U.S. at 452 n. 14, 453. "[T]he ability to listen and form one's own conclusion," the court of appeals stressed, "furthers the congressional goal of providing the public with full information about the Nixon Presidency." Pet. App. 23a.[8]

[8]The court of appeals indicated that Mr. Nixon's suggestions for alternative means of access – for example, disclosing the substance of the tapes via transcripts or synopses – did not "represent any further safeguard. . . significant enough to justify their interference with the Act's goal of public access." Pet. App. 22a. Mr. Nixon repeats his suggestions for such alternative means of access in his Petition. Pet. 13. As the court of appeals observed, it is difficult to see how disclosure of

(Footnote continued on next page)

The regulation permitting researchers to listen to nonpersonal, nonprivileged portions of the tapes does not violate Mr. Nixon's constitutional rights, and the decision of the court of appeals upholding that regulation are consistent with this Court's decision in *Nixon v. Administrator*. Accordingly, the petition for a writ of certiorari on the tapes-access issue should be denied.

II. THE COURT OF APPEALS CORRECTLY FOLLOWED THIS COURT'S DECISION IN *NIXON* V. *ADMINISTRATOR* IN ALLOWING ARCHIVISTS TO REVIEW DICTABELTS IN THE DETAIL NECESSARY TO DETERMINE WHETHER THEY CONSTITUTE A PERSONAL DIARY

The court of appeals upheld the archivists' proposed procedure for reviewing tape recordings, some of which may contain Mr. Nixon's personal diary entries. Contrary to Mr. Nixon's view, that procedure does not *require* that the archivists subject the dictabelts to "word-by-word" review. Pet. 14-16. Nor does that procedure vest archivists with "unlimited . . . discretion" to determine how to identify personal diaries. *Id.* 14. Rather, the procedure sanctioned by the court of appeals permits archivists to review the dictabelts "in the detail *necessary* to ascertain whether the dictabelt . . . constitutes a personal diary." Pet. App.

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the contents of the tapes via transcripts or synopses would lessen any interference with Mr. Nixon's rights; the only difference between allowing researchers to listen to the tapes and allowing researchers to read transcripts or synopses "would likely represent a difference of completeness or accuracy, not any difference even arguably relevant to protecting confidential matters." Pet. App. 23a.

31a (emphasis added).[9] "If an introductory phrase or certain portions of a tape reveal the tape to be a diary," the court below stressed, "the archivists will not review the tape further." *Id.* Furthermore, once diary material is identified by means of archival processing, the archivists, in keeping with this Court's decision in *Nixon v. Administrator*, will immediately return the material to Mr. Nixon. *Id.* 30a; 41 C.F.R. § 105-63.401(a). *See Nixon v. Administrator*, 433 U.S. 488 (White, J., concurring).[10]

Notwithstanding these limitations on the review procedure sanctioned by the court of appeals, Mr. Nixon urges that the regulations are defective for not *prohibiting* "word-by-word review." Pet. 16. But as an affidavit submitted in this case by Mr. Nixon himself makes clear, the physical form of the alleged diary and the wide variations in Mr. Nixon's procedures in dictating it provide no clear way to recognize all his diary entries.[11] Because of these variations in dictating procedures, the court of appeals

[9]The regulations mandate that the archivists "take all reasonable steps to minimize the degree of intrusion into private or personal materials." 41 C.F.R. § 105-63.401-2(a).

[10]All parties have agreed that if a diary is found in the materials in the Administrator's custody, it shall be returned promptly to the owner.

[11]Mr. Nixon's affidavit is attached hereto as Appendix 4, Opp. App. 21a-23a. In his affidavit, Mr. Nixon stated that his diary is contained on dictabelts and cassette tapes, but he did not allege that *all* tapes and cassettes in the Administrator's custody were part of his diary. Nor did he assert that the diary recordings were labelled as such. Thus, he conceded that the archivists would need to listen to at least an introductory sentence on each recording, but he claimed that it would not be necessary to go beyond that. However, the alleged introductory phrases used by Mr. Nixon were not consistent and are not sufficient standing alone to establish that a recording is part of a diary. For example, Mr. Nixon states in his affidavit that he began his dictation in a variety of ways, including vague sentences such as "Eleven twenty-five; December eight. I called . . . ." *See* Opp. App. 23a.

(Footnote continued on next page)

held, no blanket restrictions can be placed on the archivists' "screening and identifying obligations under the [Presidential Recordings and Materials Preservation] Act." Pet. App. 35a. In order to further the important congressional interest in preserving "an accurate and complete historical record," *Nixon v. Administrator*, 433 U.S. at 452 n. 14 (quoting *Nixon v. Administrator*, 408 F.Supp. 321, 349 (D.D.C. 1976)), the archivists must be allowed enough flexibility to screen the dictabelts in the detail necessary to determine whether they constitute a personal diary. If some word-by-word review is necessary to make that determination, the archivists cannot, consistent with their responsibility for preserving a complete and accurate historical record, be prohibited from undertaking that review.

Mr. Nixon asserts that the court below "ignored" an alternative method for identifying Mr. Nixon's diaries, that is, using certain "triggering phrases" to identify the diaries whenever those phrases are adequate for that purpose, and, only if those phrases are inadequate, reviewing "such portions of the dictation as are necessary to determine its character." Pet. 15. In fact, however, the procedure upheld by the court of appeals is quite similar to the method that Mr. Nixon says he prefers. While emphasizing that Mr. Nixon's varied methods of dictating prevent the archivists from automatically and conclusively identifying diary entries by the presence of any "trigger phrases" (Pet. App. 36a), the court below noted that "[i]f an introductory phrase or certain portions of a tape reveal the tape to be a diary, the archivists will not review the

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Another obvious difficulty that the archivists will face in identifying any diaries is the fact that many of the entries were dictated in the Oval Office, where they were picked up by the voice-activated taping system and thus were intermingled with all other Oval Office conversations.

tape further." *Id.* 31a (emphasis added). Only if it is necessary to undertake some further review – perhaps including word-by-word review – will the archivists do so. *Id.*[12]

The decision of the court of appeals minimizes any intrusion that archival screening of the dictabelts might have on Mr. Nixon's privacy rights. The flexible screening process that the court of appeals upheld is required by the variety of Mr. Nixon's dictating procedures, as explained by Mr. Nixon himself. Accordingly, the petition should be denied.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. NIXON'S UNTIMELY DISCOVERY REQUESTS

Finally, Mr. Nixon contends that the district court abused its discretion in limiting his efforts to obtain discovery on two matters: the views of President Carter on the tapes-access regulation, and the restrictions on public access to tape recordings of the Kennedy and Johnson Administrations. The district court's limitations on Mr. Nixon's discovery efforts, however, were well within the court's broad discretion. *See* 8 *C. Wright & A. Miller, Federal Practice and Procedure* § 2036, at 267-68 (1970). Mr. Nix-

[12]We also note that Mr. Nixon did not urge the courts below to adopt this "alternative." Mr. Nixon's unequivocal position in the district court was that his alleged diaries could be easily identified on the basis of "triggering phrases." Moreover, the issue framed by the settlement agreement among the parties is limited to the question "whether materials which are claimed to be diaries shall be treated as inherently private or personal and therefore returned without any further archival processing." Appendix 2, hereto, Opp. App. 14a.

on's discovery efforts were untimely, and the issues before the district court were almost entirely legal in nature.

As described above, it was Mr. Nixon who suggested that discovery be "narrowly limited" and that the two issues left open by the settlement agreement be resolved by summary judgment. See Opp. App. 18a-20a. At the time Mr. Nixon moved for summary judgment, he had received responses to all the discovery requests that he had made since the execution of the settlement agreement. Mr. Nixon did not move for leave to depose the White House Counsel — in order to seek, *inter alia*, President Carter's views on the tapes-access regulation — until after he filed his motion for summary judgment. And he did not seek to depose the Archivist of the United States and a Deputy Assistant Archivist — to inquire, *inter alia*, into restrictions on public access to tape recordings of the Kennedy and Johnson Administrations — until more than a month after that, by which time all parties had filed their motions for summary judgment. These discovery efforts were untimely under Mr. Nixon's own schedule, and the district court cannot be held to have abused its discretion in denying them.

Furthermore, the matters into which Mr. Nixon sought to inquire were unnecessary or irrelevant to the resolution of the issues before the district court. Inasmuch as President Carter's Administrator of General Services promulgated, and his Department of Justice defended, the tapes-access regulation, no further inquiry into the President's position was necessary. *See* note 7, *supra*. In any event, the court of appeals' conclusion that the Administrator had devised a system for public access to the tapes that does not violate the Constitution did not depend on President Carter's position on the matter. See Pet. App. 38a. Similarly, the constitutionality *vel non* of the tapes-

access regulation does not turn in any way on the methods by which the tape recordings of prior administrations were made available to the public. *Id.* 39a. Indeed, in *Nixon v. Administrator*, 433 U.S. at 471-72, this Court rejected the notion that disposition of the presidential materials of the Nixon Administration should be governed by the treatment accorded the materials of other former presidents.

Mr. Nixon relies on *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962), to support his assertion that the district court abused its discretion in this discovery matter. *Rickover* was a declaratory judgment action involving the question of ownership rights in intellectual property arising out of public employment. In remanding the case for a fuller development of the facts, this Court emphasized the importance of facts to a resolution of the particular issues presented, and the need for a "discretionary declaratory judgment" to "rest on an adequate and full-bodied record." *Id.* at 113. The record on which the lower courts had acted, the Court said, was "woefully lacking" in the development of facts critical to a resolution of those issues. *Id.*

Here, by contrast, the issues before the district court — issues concerning the constitutionality of regulations — were primarily legal in nature.[13] The question whether Mr. Nixon has a constitutionally protected personal privacy interest in communications relating to governmental matters could be decided on the basis of the law, without any belated inquiry into President Carter's views on the subject

[13]Because of the lack of factual issues involved, challenges to administrative regulations are particularly appropriate for resolution on summary judgment. *See* 6 *J. Moore, Federal Practice* ¶ 56.17[3] at 693-95.

or into the degree of public access to tape recordings of the Kennedy and Johnson Administrations. Thus, the court of appeals was plainly correct in holding that the district court did not abuse its discretion.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 1982

APPENDIX 1

41 C.F.R. § 105-63.104(a) 2a
41 C.F.R. § 105-63.401 ..... 2a
41 C.F.R. § 105-63.401-1 ..... 4a
41 C.F.R. § 105-63.401-2 ..... 6a
41 C.F.R. § 105-63.401-3 ..... 9a
41 C.F.R. § 105-63.402-1 ..... 10a
41 C.F.R. § 105-63.402-2 ..... 12a
41 C.F.R. § 105-63.405 ..... 13a

§ 105-63.104 Definitions.

For the purposes of this Part 105-63, the following terms have the meaning ascribed to them in this § 105-63.104.

(a) *Presidential historical materials.* The term "Presidential historical materials" (also referred to as "historical materials" and "materials") shall mean all papers, correspondence, documents, pamphlets, books, photographs, films, motion pictures, sound and video recordings, machine-readable media, plats, maps, models, pictures, works of art, and other objects or materials made or received by former President Richard M. Nixon or by members of his staff in connection with his constitutional or statutory powers or duties as President and retained or appropriate for retention as evidence of or information about these powers or duties. Included in this definition are materials relating to the political activities of former President Nixon or members of his staff, but only when those activities directly relate to or have a direct effect upon the carrying out of constitutional or statutory powers or duties. Excluded from this definition are documentary materials of any type that are determined to be the official records of an agency of the Government; private or personal materials; stock of publications, processed documents, and stationery; and extra copies of documents produced only for convenience of reference, when they are clearly so identified.

§ 105-63.401 Processing period; notice of proposed opening.

(a) The Administrator will commence the initial archival processing of the materials. In processing the materials, the archivists will give priority to segregating

private or personal materials and transferring them to their proprietary or commemorative owner in accordance with § 105-63.401-3, below. As soon thereafter as possible, the Administrator will open for public access all of the materials in the Administrator's custody and control which are neither restricted pursuant to § 105-63.402 nor subject to outstanding claims or petitions seeking such restriction. The Administrator will open for public access each integral file segment of the materials upon completion of initial archival processing on that segment. Insofar as practicable, the Administrator will give priority in such initial archival processing to materials relating to abuses of governmental power as defined in § 105-63.104(c).

(b) At least 30 calendar days prior to the opening to public access of any integral file segment of the materials, the Administrator will publish notice in the *Federal Register* of the proposed opening. The notice will reasonably identify the material to be opened and will include a reference to the right of any interested person to file a claim or petition in accordance with § 105-63.401-1. Copies of the notice will be sent to the incumbent President of the United States or his designated agent and by first-class mail to the last known address of: Mr. Nixon, or his designated agent of heirs; any former staff member reasonably identifiable as the individual responsible for creating or maintaining the file segment proposed to be opened; any individual named in material which the Administrator may not restrict in accordance with § 105-63.402-1(b) because the material is essential to an understanding of an abuse of governmental power; and any persons named in the materials who are registered with the General Services Administration in accordance with § 105-63.401(c), below.

(c) The Administrator will maintain a registry which shall contain the names and mailing addresses of persons

who wish to receive personal notice of the proposed opening of integral file segments of the materials when those segments contain references about them. To be included in the registry, a person must submit his/her name and mailing address to the General Services Administration (NLN), Washington, D.C. 20408. Both the envelope and letter should be prominently marked, "Nixon Materials Registry." By submitting his/her name for inclusion in the registry, a person agrees to reimburse the United States for the cost of first-class postage for each instance of personal notice received.

§ 105-63.401-1 Rights and privileges; right to a fair trial.

(a) Within 30 days following publication of the notice prescribed in § 105-63.401(b), any person claiming a legal or constitutional right or privilege which would prevent or limit public access to any of the materials shall notify the Administrator in writing of the claimed right or privilege and the specific materials to which it relates. Unless the claim states that particular materials are private or personal (see paragraph (d), below), the Administrator will notify the claimant by certified mail, return receipt requested, of his decision regarding public access to the pertinent materials. If that decision is adverse to the claimant, the Administrator will refrain from providing public access to the pertinent materials for at least 30 calendar days from receipt by the claimant of such notice.

(b) Within 30 days following publication of the notice prescribed in § 105-63.401(b), officers of any Federal, State, or local court and other persons who believe that public access to any of the materials may jeopardize an individual's right to a fair and impartial trial should petition the Administrator setting forth the relevant circumstances

that warrant withholding specified materials. The Administrator will notify the petitioner by certified mail, return receipt requested, of his decision regarding public access to the pertinent materials. If that decision is adverse to the petitioner, the Administrator will refrain from providing public access to the pertinent materials for at least 30 calendar days from receipt by the petitioner of such notice.

(c) In reaching decisions required by paragraphs (a) and (b) of this section, the Administrator may consult with other appropriate Federal agencies. If these consultations require the transfer of copies of the materials to Federal officials in agencies other than the General Services Administration, the Administrator will transfer these copies in accordance with the procedures prescribed in §§ 105-63.204 and 105-63.302.

(d) Within 30 days following publication of the notice prescribed in § 105-63.401(b), any person claiming that materials proposed for public access are in fact private or personal, as defined in § 105-63.104(b), and that he or she is the proprietary or commemorative owner of those materials shall notify the Administrator in writing. The claim shall describe the specific materials to which it refers, and the claimant's basis for concluding that these materials are private or personal. Upon receipt of such a claim, the Administrator will transmit it to the Presidential Materials Review Board for its consideration and determination in accordance with § 105-63.401-2(i). The Administrator will refrain from providing public access to the pertinent materials or from returning them to the claimant for at least 30 calendar days from receipt by the claimant or any intervening parties of the Board's determination.

§ 105-63.401-2 Segregation and review; Senior Archival Panel; Presidential Materials Review Board.

(a) During the processing period described in § 105-63.401(a), the Administrator will assign archivists to segregate private or personal materials, as defined in § 105-63.104(b). The archivists shall have sole responsibility for the initial review and determination of private or personal materials. At all times when the archivists or other authorized officials have access to the materials in accordance with these regulations, they shall take all reasonable steps to minimize the degree of intrusion into private or personal materials. Except as provided in these regulations, the archivists or other authorized officials shall not disclose to any person private or personal or otherwise restricted information learned as a result of their activities under these regulations.

(b) During the processing period described in § 105-63.401(a), the Administrator will assign archivists to segregate materials neither relating to abuses of governmental power, as defined in § 105-63.104(c), nor otherwise having general historical significance, as defined in § 105-63.104(d). The archivists shall have sole responsibility for the initial review and determination of those materials which are not related to abuses of governmental power and do not otherwise have general historical significance.

(c) During the processing period described in § 105-63.401(a), the Administrator will assign archivists to segregate materials subject to restriction, as prescribed in § 105-63.402. The archivists shall have sole responsibility for the initial review and determination of materials that should be restricted. The archivists shall insert a notification of withdrawal at the front of the file folder or con-

tainer affected by the removal of restricted material. The notification shall include a brief description of the restricted material and the basis for the restriction as prescribed in § 105-63.402.

(d) If the archivists are unable to make a determination required in paragraphs (a), (b), or (c) of this section, or if the archivists conclude that the required determination raises significant issues involving interpretation of these regulations or will have far-reaching precedential value, the archivists shall submit the pertinent materials, or representative examples of them, to a panel of senior archivists selected by the Archivist of the United States. The Panel shall then have the sole responsibility for the initial determination required in paragraphs (a), (b) or (c) of this section.

(e) If the Senior Archival Panel is unable to make a determination required in paragraph (d) of this section, or if the panel concludes that the required determination raises significant issues involving interpretation of these regulations or will have far-reaching precedential value, the Panel shall certify the matter and submit the pertinent materials, or representative examples of them, to th Presidential Materials Review Board.

(f) The Presidential Materials Review Board ("Board") shall consist of the Archivist of the United States, who shall serve as Chairman, and the following additional members:

(1) The Assistant Archivist for the Office of the National Archives;

(2) The Assistant Archivist for the Office of the Presidential Libraries;

(3) The General Counsel of the General Services Administration; and

(4) A person, distinguished in archival science, history or political science, who shall not otherwise be a Federal employee or official, nominated by the Council of the Society of American Archivists.

The Board shall meet at the call of the Chairman. Three members of the Board shall constitute a quorum for the conduct of the Board's business, although each member of the Board may participate in all of the Board's decisions. Members of the Board may be represented by their delegates on those occasions when they are unable to attend the meetings of the Board. The Board may consult with officials of interested Federal agencies in formulating its decisions. To the extent these consultations require the transfer of copies of materials to Federal officials outside the General Services Administration, the Board shall comply with the requirements of §§ 105-63.204 and 105-63.302.

(g) When the matter certified to the Board by the Senior Archival Panel involves a determination required in paragraphs (a) or (b) of this section, the Board shall prepare a final written decision, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Board's decision will be the final administrative determination.

(h) When the matter certified to the Board by the Senior Archival Panel involves a determination required in paragraph (c) of this section, the Board shall recommend an initial determination to the Senior Archival Panel, which shall retain the sole responsibility for the initial determination.

(i) When the Board considers a matter referred to it by the Administrator as provided in § 105-63.401-1(d), it shall follow these procedures:

(1) The Board will notify the claimant of its consideration of the claim, and invite the claimant to supplement at his discretion the basis for the claim.

(2) The Board will publish notice in the *Federal Register,* advising the public of its consideration of the claim, and describing the materials in question as fully as reasonably possible without disclosing arguably private or personal information. The notice will further advise that any member of the public may petition the Board within 15 calendar days of the publication of notice, setting forth the intervenor's views concerning the public or private nature of the materials.

(3) The Board shall take into account the positions maintained by the claimant and any intervenors in reaching its decision. The Board shall issue its decision, including dissenting and concurring opinions, no sooner than 20 days nor later than 60 days from the publication of notice in the *Federal Register* provided in paragraph (h)(2), of this section. The Board's decision shall be the final administrative determination. The Administrator will notify the claimant and any intervenors of the Board's decision by certified mail, return receipt requested, and shall refrain from acting upon that decision for 30 calendar days as provided in § 105-63.401-1(d).

§ 105-63.401-3 Transfer of materials.

(a) The Administrator will transfer sole custody and use of those materials determined to be private or personal, or to be neither related to abuses of governmental

power nor otherwise of general historical significance, to former President Nixon or his heirs or, when appropriate and after notifying Mr. Nixon or his designated agent, to the former staff member having primary proprietary or commemorative interest in the materials.

(b) Materials determined to be neither related to abuses of governmental power nor otherwise of general historical significance, and transferred pursuant to paragraph (a) of this section, shall upon such transfer no longer be deemed Presidential historical materials as defined in § 105-63.104(a).

§ 105-63.402-1 Materials related to abuses of governmental power.

(a) The Administrator will restrict access to materials determined during the processing period to relate to abuses of governmental power, as defined in § 105-63.104(c), when:

(1) The Administrator, in accordance with § 105-63.401-1, is in the process of reviewing or has determined the validity of a claim by any person of a legal or constitutional right or privilege; or

(2) The Administrator, in accordance with § 105-63.401-1, is in the process of reviewing or has determined the validity of a petition by any person of the need to protect an individual's right to a fair and impartial trial; or

(3) The release of the materials would violate a Federal statute; or

(4) The materials are authorized under criteria established by Executive order to be kept secret in the in-

terest of national defense or foreign policy, provided that any question as to whether materials are in fact properly classified or are properly subject to classification shall be resolved in accordance with the applicable Executive order or as otherwise provided by law. However, the Administrator may waive this restriction when:

(i)(A) The requester is engaged in a historical research project; or (B) the requester is a former Federal official who had been appointed by the President to a policymaking position and who seeks access only to those classified materials which he originated, reviewed, signed or received while in public office; and

(ii) The requester has a security clearance equivalent to the highest degree of national security classification that may be applicable to any of the materials to be examined; and

(iii) The Administrator has determined that the heads of agencies having subject matter interest in the material do not object to the granting of access to the materials; and

(iv) The requester has signed a statement, which declares that the requester will not publish, disclose, or otherwise compromise the classified material to be examined and that the requester has been made aware of Federal criminal statutes which prohibit the compromise or disclosure of this information.

(b) The Administrator will restrict access to any portion of materials determined to relate to abuses of governmental power when the release of those portions would constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person: *Provided,* That if material related to an abuse of governmental

power refers to, involves or incorporates such personal information, the Administrator will make available such personal information, or portions thereof, if such personal information, or portions thereof, is essential to an understanding of the abuses of governmental power.

§ 105-63.402-2 Materials of general historical significance unrelated to abuses of governmental power.

(a) The Administrator will restrict access to materials determined during the processing period to be of general historical significance, but not related to abuses of governmental power, under one or more of the circumstances specified in § 105-63.402-1(a).

(b) The Administrator will restrict access to materials of general historical significance, but not related to abuses of governmental power, when the release of these materials would:

(1) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential; or

(2) Constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person; or

(3) Disclose investigatory materials compiled for law enforcement purposes, but only when the disclosure of such records would:

(i) Interfere with enforcement proceedings;

(ii) Deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Constitute an unwarranted invasion of personal privacy;

(iv) Disclose the identity of a confidential source, and in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(v) Disclose investigative techniques and procedures, or;

(vi) Endanger the life or physical safety of law enforcement personnel.

§ 105-63.405 Reproduction and authentication of other materials.

(a) The copying for researchers of materials other than tape recordings described in § 105-63.404 normally will be done by personnel of the General Services Administration using Government equipment. With the permission of the Administrator or his designated agent, a researcher may use his own copying equipment. Permission shall be based on the determination that such use will not harm the materials or disrupt reference activities. Equipment shall be used under the supervision of GSA personnel.

(b) The Administrator may authenticate and attest copies of materials when necessary for the purpose of the research.

(c) The fees for reproduction and authentication of materials under this section shall be those prescribed in the schedule set forth in Subpart 105-61.52 or pertinent successor regulation, as that schedule is amended from time to time.

APPENDIX 2

AGREEMENT

The parties enter into this Agreement in order to settle as many issues in this litigation as possible.

1. **Amendment of Regulations.**

The Administrator of General Services will submit to the Congress various modifications of the regulations that are the subject of this action. The regulations, as modified, are set forth in Attachment A. The Administrator has also prepared various documents to be included in a "Nixon Materials Archival Processing Manual," explaining the manner in which certain of the regulations will be interpreted or applied. These documents are set forth in Attachment B.

2. **Effective Date.**

This Agreement shall become final at such time as the regulations referred to in paragraph 1 become effective. In the event the regulations do not become effective, this Agreement shall be terminated.

3. **Continuation of This Action.**

Until the regulations become effective, all issues in this litigation will be held in abeyance except the issues of (a) whether the tape recorded presidential conversations may be made generally available for public listening ("the tape access issue"); and (b) whether materials which are claimed to be diaries shall be treated as inherently private or personal and therefore returned without any further archival processing ("the diary issue"). The parties have decided to litigate the tape access and diary issues independently of

this Agreement. In the event this Agreement is terminated, the parties may at that time resume litigation of any or all of the issues settled by this Agreement.

4. **Processing Prior to Final Settlement.**

Until this Agreement becomes final, the archivists may continue processing the materials in accordance with informal agreements reached by the Archivist and counsel for former President Nixon. Until this Agreement becomes final, there will be no public disclosure of any materials under the public access regulations and no activities with respect to the materials by the Presidential Materials Review Board.

5. **Dismissal of Various Claims For Relief.**

On or before February 28, 1979, plaintiff Nixon will file a third amended complaint challenging the validity of Section 105-63.404(b) and (c) of the regulations and raising the diary issue. When this Agreement becomes final, plaintiff will dismiss each of the claims set forth in the second amended complaint. With regard to the tape access and diary issues framed by the third amended complaint, plaintiff will not contend that the regulations are unconstitutional or void because promulgated subject to the one-House veto provision of the Act, and defendants will not contend that congressional acceptance of the regulations supports their validity. However, in the event this Agreement is terminated, the pleadings may be amended to raise such claims.

6. **Effect of Agreement on Other Litigation or New Regulations.**

In the event that, subsequent to the settlement of this action, any of the existing regulations or proposed

amended regulations are deleted or amended, or new regulations are added, plaintiff is not barred from challenging such changes and may assert any claims he may have and advance any arguments there may be with respect thereto. Plaintiff will not challenge any of the existing regulations or proposed amended regulations which are not affected by such post-settlement changes in the regulations.

In the event anyone challenges the validity of the existing or proposed amended regulations, this Agreement shall not bar any party from presenting any and all claims, defenses, or arguments there may be to sustain the validity of the challenged regulations or to invalidate the regulations as subsequently modified in response to a successful challenge thereto.

7. **Intervenor-Defendants.**

(a) This Agreement does not prevent members of the intervenor-defendant organizations, acting on their own behalf, from seeking modifications of any of the regulations or from challenging the validity thereof.

(b) This Agreement does not prevent the intervenor-defendant organizations from seeking modifications of, or challenging the validity of, any of the regulations, other than the amendments set forth in Attachment A and the standards and procedures described in the archivist processing manual material set forth in Attachment B.

(c) Without limiting the generality of the foregoing, this Agreement does not prevent intervenor-defendants from seeking a change in the regulations to provide that the Administrator will make available to members of the public copies of the tape recordings described in Section 105-63.404(a), and such an amendment will not operate to terminate this Agreement.

8. Other Documents

Together with this Agreement, the parties will file with the Court copies of (a) the letter to the General Services Administration from counsel for plaintiff, dated February 12, 1979, and (b) the letter to the General Services Administration and counsel for plaintiff from counsel for intervenor-defendants, dated February 14, 1979.

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD NIXON, *Plaintiff,*	)	
v.	)	
JOEL W. SOLOMON, as Administrator of General Services,	)	Civil Action No. 77-1395
Defendant,	)	
and	)	
THE REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, *et al.,* *Intervenor-Defendants.*	)	

PLAINTIFF'S PROPOSED SCHEDULE FOR DISPOSITION OF REMAINING ISSUES

Counsel for plaintiff respectfully submit the following schedule for disposition of the issues remaining in this litigation after the settlement agreement between the parties.

March 7, 1979	Third Amended Complaint filed
March 19, 1979	Answers to Third Amended Complaint due
March 23, 1979	Parties may file limited requests for admissions, interrogatories

	or requests for production of documents reasonably necessary for the fiiing of dispositive motions.
March 28, 1979	Responses to Discovery Requests due
April 25, 1979	Plaintiff's Motion for Summary Judgment due
May 23, 1979	Defendants' Opposition and/or Cross-Motions for Summary Judgment due
June 1, 1979	Plaintiff's Reply to Defendants' Opposition and/or Cross-Motions for Summary Judgment due

Plaintiff contemplates that any discovery requests would be narrowly limited to Counts III and IV of the Third Amended Complaint, and in particular would be limited to (1) the manner in which the regulations and review procedures at issue therein will be implemented by defendant, (2) past practices of defendants in processing the tape and dictabelt materials in issue, insofar as these practices bear upon the reasonableness or unreasonableness of the current regulations, (3) and materials pertaining to the promulgation of these particular regulations. There should be little dispute about these facts. At the same time, their inclusion in the record, for purpose of summary judgment disposition, is necessary fully to inform the Court of the nature of the review and processing of which plaintiff complains. In the absence of these undisputed facts, the record upon which the Court would be forced to base its ruling would be inadequate.

Accordingly, we request that the Court approve the above-outlined schedule for disposition of the remaining issues in this litigation.

Respectfully submitted,

/s/ R. Stan Mortenson
R. Stan Mortenson

/s/ James E. Rocap, III
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AFFIDAVIT

COUNTY OF ORANGE
STATE OF CALIFORNIA

Richard Nixon, being duly sworn under oath, deposes and says as follows:

(1) I am a citizen of the United States and a resident of the State of California, my residence being at San Clemente, California.

(2) From January 20, 1953 until January 20, 1961, I served as Vice President of the United States. I was elected President of the United States and served in that office from January 20, 1969 until my resignation on August 9, 1974.

(3) During my presidency, from November, 1971 until April, 1973 and again in June and July, 1974, I kept a diary expressing my personal reflections, thoughts, ideas and concerns with regard to the activities, events and conversations of that day or of immediately preceding days. This diary consisted of a series of dictated dictabelts which, frequently, I dictated on a daily basis.

(4) I considered all of these diary dictations to be of the utmost confidentiality. They reflected my innermost thoughts and feelings regarding a wide range of events and personalities. Often done at the end of the day, they recorded my personal emotions and reactions. Many of the thoughts and emotions expressed in them were not to be shared with anyone except the trusted personal secretary who – at sometime in the future – I would, out of necessity, have transcribe them for my review.

(5) One reason I kept a diary was so that after I left office, I could use it to help refresh my memory concerning the happenings in my life during a time I was often consumed in the day to day events.

(6) These diaries were never intended by me to assist in any way in the conduct of my duties as President. No member of my staff nor any personal friend or member of my family listened to these dictations during my presidency, except for the few that were turned over to the office of the Watergate Special Prosecutor. These dictabelts were kept at my express request in a safe with my personal records. They were not in fact referred to, nor did they ever serve as an aid in the conduct of my official duties.

(7) When I began keeping a diary in November of 1971, I dictated onto magnetic dictabelts. I always started the diary dictation on a new dictabelt, and I never combined it on the same dictabelt with dictation concerning official matters. I continued to use these dictabelts until 1973, when I also used a portable cassette tape recorder which enabled me to get more than one day's dictation on a single cassette. However, depending upon which office I was in when I dictated the diary entry, I continued intermittently to use the dictabelts.

(8) Because I was dictating the diary strictly for my own use, I began each dictation in a way which would readily distinguish it from other documents and memoranda that I also put on dictabelts. For example, if dictating a memorandum of instruction to my chief of staff, I would begin the dictation with: "This is a memorandum for Bob Haldeman." There might be variations, such as: "This is a memorandum for Bob Haldeman with copies to Herb Klein and Ron Ziegler," or words to that effect. My diary, however, was addressed to no one. Sometimes the dicta-

tion began with a statement of the date followed by the beginning of a recitation of events. For example, one began this way: "Eleven twenty-five; December eight. I called . . . ." As I continued to make these diaries, I began with greater regularity to preface them with opening comments designating them as private. For example: "March 9, 1972. Memorandum for the private file – not to be transcribed." Or "This is the second tape dictated for file, not to be transcribed – at Camp David on Saturday afternoon, January 6, 1973." In order to protect the privacy of these dictations, I would hand them directly to my personal secretary noting verbally that they were for my private file or would attach a note to the dictabelt itself, instructing that it be put in my private file and not transcribed. Thus, even my personal secretaries never listened to any portion of my dictated diaries.

(9) Sometimes I dictated diary entries in the Oval Office and in the Executive Office Building – both of which had room recording devices during a portion of my Presidency. I was not consciously aware that what I dictated into the microphone in my hand was also being recorded on my office taping system. If I had had that awareness, however, I would not have been concerned because, during my Presidency, it was my unqualified expectation that these diary dictations, along with the taped office and telephone conversations, would never be made public without my prior review and consent.

/s/ Richard Nixon
RICHARD NIXON

Subscribed and sworn to before me
on May 1, 1979
/s/ Pauline G. Egan
Pauline G. Egan